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CHARLES ELMORE

IN THE

Supreme Court of the United States

Consolidated—No. 446, October Term, 1931;
No. 453, October Term, 1932.

R. S. STERLING, GOVERNOR OF TEXAS,

Et Als., *Appellants,*

vs.

E. CONSTANTIN, Et Al., *Appellees.*

BRIEF FOR APPELLEES

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IN THE

Supreme Court of the United States

Consolidated—No. 746, October Term, 1931;
No. 453, October Term, 1932.

R. S. STERLING, GOVERNOR OF TEXAS,

Et Als., *Appellants,*

vs.

E. CONSTANTIN, Et Al., *Appellees.*

BRIEF FOR APPELLEES

I

STATEMENT OF THE CASE

Appellees regard the "Statement of the Case" as made in Appellants' Brief as being inaccurate and incomplete,—especially so in view of the fact that their propositions would seem to invite the Court to review voluminous evidence touching various questions presented in their Assignments and Argu-

ment. Appellees will undertake, here, to offer a somewhat fuller statement of the Record.

A.—APPELLEES' TITLES AND OWNERSHIP, ETC.

In the year of 1867, or thereabout, the State of Texas, for valuable considerations, contracted to sell and convey and did sell and convey to Appellees' remote vendors the lands involved in this suit. The title thus contracted for and conveyed was absolute fee simple. The contract provided for conveyance of (and there was conveyed), as part of the lands and title, all minerals therein or producible from or by means thereof with full right to take, use or "squander" any and all minerals (solid, liquid, gaseous and "fugacious") in or that might, at any time, be in the lands. And such minerals and titles thereto and rights with respect thereto, by and through valid contracts and conveyances supported by valuable considertions and ante-dating enactment of the so-called "Conservation Statutes" hereinafter refererd to or other statutes relied upon by Appellants, were acquired, and are now owned, by Appellees. (R. 5-6, 20-21, 167). Stephens County vs. Mid-Kansas Oil & Gas Co., 113 Texas 160, 254 S. W. 290. Upon these lands, and at great expense, Appellees had (prior to effective date of such statutes) properly drilled and equipped various wells, each of which was properly capable of producing

5,000 barrels (or more) of valuable oil per day; and upon such lands Appellees desired and intended so to drill and equip other wells. Such completed wells were (and such intended wells would have been) properly operated; and Appellee's had proper facilities for saving and handling the oil and had available markets for all oil that might be produced from their wells. (R. 11, 13-14, 24, 25, 26). Such oil had a market value of from 68 cents to 83 cents per barrel. (R. 26) and each of Appellees, if allowed to operate their completed wells to the extent of their proper capacity, would receive a net income from such operation of at least $45,000.00 per month. (R. 26-27). Each of the wells of Appellees, on and prior to August 12, 1931, was capable of producing and (properly operated, as it was) was producing at least 5,000 barrels of oil per day,—all without "waste" of any kind. (R. 11, 13-14, 24-26). By and through inauguration and maintenance of "Martial Law" and conduct of Appellants thereunder Appellees were caused and forced to abandon any production of oil from such wells from August 17, 1931, until on or about September 5, 1931 (R. 63, 283); thereafter and until September 18, 1931, Appellees were caused and forced to restrict production of oil from each of their wells to 225 barrels per day (R. 68); from September 18, 1931, until October 10, 1931, such production was so restricted to 185 barrels per well per day (R. 68-69); there-

after such production was so restricted to varying lesser amounts so as that at time of the trial of this case in January, 1932, Appellees were permitted to produce from each of such wells only 100 barrels per day (R. 69-70, 73, 85, 94, 95, 96).

B.—THE PLEADING AND EVIDENCE

Because of the sources and nature of Appellees' titles and ownership, as above described, Appellees, in their pleading, claimed and asserted that the acts and conduct complained of, and the statutes and constitutional provisions of the State, if any, which undertake to warrant such acts and conduct, operated impairment of the obligations of the contracts under which the State parted with title to the lands in question and the mesne contracts and conveyances under which Appellees acquired those titles,—all in violation of Sec. 10 of Art. I of the Constitution of the United States (R. 2-3, 31, 49-50). Appellees, in their pleading, also claimed and asserted that such acts and conduct, and stautes and constitutional provisions (if any) attempting to warrant same, violated the due-process and the equal-protection clauses of the Fourteenth Amendment of the Constitution of the United States (R. 2-3, 31-32, 49-55) in that such stautory and constitutinoal provisions (under which Appellants claimed to act, (R. 48, 49-50), were and are arbitrary and capricious, fatally ambiguous and indefi-

nite and attempt to delegate to and vest in enforcing officers unrestricted and unbridled power and discretion (R. 2-3, 31-32, 50-55) and in that the acts and conduct of Appellants, et. als., were and are arbitrary, capricious and unjust and in user of unrestricted power and "discretion" (R. 2-3, 31-32, 49-55) and, while done under claim or color of authority of such laws, such acts were and are being done in bad-faith and pursuant to wrongful and unlawful conspiracy, agreement, intent and purpose and for the wrongful, fraudulent and unlawful purpose (amongst others) of attempting to affect market prices of oil by so controlling and restricting production thereof (R. 27-30, 32-39, 44-56).

The suit having been filed October 13, 1931, (R-1), and therein application for restraining order and temporary injunction order having been made (R. 18) and presented to Honorable Randolph Bryant, District Judge, and thereupon (on said day) order having been duly signed, made and entered in the cause restraining Appellant Wolters, et als., from interfering with Appellees in production of oil from their wells and setting the matter of the application for temporary injunction (of like effect) for hearing for October 28, 1931, and Appellant R. S. Sterling, claiming to act as Governor, having thereupon (on said day) ordered Appellant Wolters, et als., to ignore such restraining order and to obey only the Governor's orders and Appellant Wolters

and his military sub-ordinates having continuously refused to obey such restarining order under claim of authority from the Governor R. 288, 289, 291, 370-371, 372, 377, 378, 379-80, 381), Appellees, by amended and supplemental Bills claimed and asserted, additionally, that the acts and conduct of Appellants and any provision of the statutes of the State which attempted to warrant such acts and conduct were in violation of various provisions of the constitution of the State and of the contract, due-process and equal-protection clauses of the Constitution of the United States as well as in violation of those provisions of paragraph 2 of Article VI and Sections 1 and 2 of Article III of the Constitution of the United States wherein, respectively, it is declared that the Constitution and constitutional laws of the United States shall be the "supreme law of the land" and that the "judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may, from time to time, ordain and establish" and that "the judicial power shall extend to all cases in law and equity arising under" the Constitution and laws of the United States whereby the said United States District Court was established and vested with jurisdiction over the parties to and subject-matter of this cause (R. 50-52).

Appellants filed their Answer in the cause Decem-

ber 23, 1931 (R. 55). Therein: It was denied that the acts and conduct of Appellants were not warranted by terms of the constitution and statutes of the State (R. 62) but, it was averred, same had that warrant (R. 80-81); it was admitted that "Martial Law" was declared August 16, 1931, put into effect August 17, 1931, and kept in effect up to time of trial (with intention to keep it in effect for an indefinite time in the future) was admitted (R. 62, 63, 68, 71, 72, 73, 75, 77-78, 79, 80-83, 85, 86),—and the pleading describes the enterprise as being a "military" one (Ibid.). Under such "martial law" and acts of the Governor as "Commander-in-Chief" and acts of the other Appellants, under claimed warrant of the "Executive Proclamations," it was admitted that Appellants had from August 17, 1931, to September 2, 1931, completely "shut down" Appellees (and others') wells (R. 63). For the period September 2, 1931, to October 13, 1931, it was admitted that production from each of such wells had been allowed in amounts only as follows: 225 barrels per day, September 2, to September 18 (R. 68); 185 barrels per day September 18 to October 10 (R. 68-69); 165 barrels per day October 10 to October 13 (R. 69-70). Up to the latter date (i.e., October 10, 1931), it was alleged, Appellants, by "Executive Orders," were enforcing the "allowable" prescribed by orders of the Railroad Commission of Texas R. 68-70); after that date, it was

admitted and alleged, the Railroad Commission "had neither exercised nor attempted to exercise any supervision over the amount of oil to be produced by wells" (including those of Appellees) "located in the Military District" (R. 73), that the latest order made by the Railroad Commission expired by its own terms October 31, 1931 (R. 73) and that since October 13, 1931, "R. S. Sterling, Governor of Texas, and Jacob F. Wolters, acting under the command of R. S. Sterling, have * * * restricted the production from oil wells in the Military District" (R. 73) as follows: 165 barrels per well per day, October 13 to October 28 (79); 150 barrels per well per day, October 28 to November 7 (R. 73, 85); 125 barrels per well per day, November 7 to ——— (R. 85), at time of the trial such production was being so restricted to 100 barrels per well per day.

Appellants, in their said pleading, claimed authority thus to inaugurate and enforce "Martial Law" and the acts complained of thereunder by reason of (claimed) "facts" stated in the pleading and, partly, in an "Executive Proclamation" (to be described), R. 62, 77, 80, 90-93 and the Governor's alleged BELIEF from such "facts" that "insurrection," etc., would result in the "Military District" unless such things were done. The "facts" and deductions drawn therefrom are thus stated in the

Answer (R. 81-86). Prior to August 16, 1931, the Governor had investigated the conditions in what is called the East Texas Oil Field; in that territory is a vast deposit of petroleum (of estimated potential production of several million barrels per day); land and royalty owners will ultimately be benefitted by the largest ultimate aggregate recovery from the field and their benefits will be "contingent upon the market price of crude petroleum oil;" the market price of oil was then very low; drilling and production (account of inadequacy of Texas laws, etc.) "proceeded in a disorderly and haphazard manner;" a large majority of land and royalty owners believed that the maximum ultimate recovery of oil was being menaced by such operations and that such manner of operations "was in great part responsible for the low price of crude oil;" the confusion incident to such manner of operation gave opportunity (which was taken) to "avoid payment * * * of royalties to which said citizens were justly entitled;" because of such beliefs the citizens * * * were determined that" such "conditions must cease" and many of them were prepared to and intended "to resort to force and arms to accomplish this end in the event it should not be brought about by the duly constituted authorities of the State" and in the attempt the "anti-social and lawless individuals" in the territory would have joined; many of the operators were

"disregarding and setting at naught the conservation laws of the State and the orders of the Railroad Commission of Texas entered thereunder" but that such laws and orders, even if enforced, "would not and could not restore" the Counties named "to a state of tranquility or prevent the danger, which was imminent, of insurrection, tumult, riot, breach of the breach and general disorder;" "accordingly and basing his decision upon the foregoing facts and for the purpose of suppressing then existing state of insurrection, tumult, riot and breach of the peace, and preventing insurrection * * * tumult and breach of the peace, which were imminent," the Governor issued his "Proclamation No. 8447" (August 16, 1931) and "declared martial law in the Counties of Gregg, Upshur, Rusk and Smith;" the Governor then believed that "martial law" would be shortlived because, he believed, "adequate laws and proper orders issued thereunder would speedily be contrived" and enforcement thereof would enable him to "lift martial law" from such area; but,—

> "This, however, has not come about. On or about the 13th day of October, 1931, this Honorable Court issued a temporary restraining order, restraining the Railroad Commission of Texas from enforcing its Order, limiting the production of oil in the East Texas oil field to 185 barrels per well per day in so far as the properties and/or wells of the plaintiffs herein were concerned, and restraining other named parties, including the defendants, Jacob F. Wol-

ters and W. W. Sterling, from so enforcing said Order. The effect of this Restraining Order was to paralyze the efforts of the Railroad Commission and of the defendants, Wolters and W. W. Sterling, in so far as said Wolters and Sterling, or either of them, were enforcing said Order of the Railroad Commission to restrict or limit the production of oil in the East Texas Oil Field.

"The effect of this enforced inability of the State Authority, charged under the Constitution and laws of Texas with the duty and authority to regulate the production and insure the conservation of natural resources in this State, and the similar inability of the defendants, Wolters and W. W. Sterling, to assist the Railroad Commission of Texas to that end, created an extraordinary emergency. The people of Gregg, Upshur, Rusk and Smith Counties became excited, alarmed and inclined to take the law into their own hands. Defendants, and especially the defendants Jacob F. Wolters and R. S. Sterling were informed and believed, and now believe, that if the East Texas Oil Field were permitted to produce in excess of 400,000 barrels of oil per day, or if any particular well, including especially the wells of Plaintiffs, were permitted to produce an amount of oil running into thousands of barrels per day, the people of Gregg, Upshur, Rusk and Smith Counties would consider that the East Texas Oil Field was being operated and exploited in a manner calculated to prejudice seriously the ultimate recovery of large quantities of oil in which the citizens of said counties had and have a financial interest, contingent upon and proportionate to the ultimate recovery of a maximum amount thereof. Defendants were informed and believed, and now believe, that the citizens of said counties

did further believe that the production in the East Texas Oil Field of an amount of oil greater than 400,000 barrels per day, or if any particular well, including especially the wells of Plaintiffs, were permitted to produce an amount of oil running into thousands of barrels per day, would cause the price of oil to drop forthwith from its then figure of 68 cents per barrel, less a gathering charge of approximately 5 cents per barrel, to a price of 15 cents or less per barrel, or at least to fall to a very low figure, to the financial detriment of those citizens owning lands, leases or royalties in said counties of Gregg, Upshur, Rusk and Smith. Defendants were informed and believed, and now believe, that by reason of their belief, which these Defendants consider to have been correct, the citizens of said counties would take the law into their own hands; that dynamite and fire would be utilized in a desperate attempt to prevent the production of oil in said counties, with the probability of great less of property and the possibility of the loss of human life, and that the general disorder necessarily contingent upon such acts would have been instantly and violently increased by lawless and anti-social individuals, then present in said counties.

"Being informed and believing as aforesaid, the Defendant R. S. Sterling, as Governor of Texas, in order to prevent the conditions hereinabove described, issued his Order to Jacob F. Wolters, Commanding Officer of the Military District above described, to limit the production of oil in said District to 165 barrels per well per day, and said Order was executed by the Defendant Jacob F. Wolters, as the Order and command of R. S. Sterling, Governor of Texas and Commander-in-Chief of its Military Forces,

his superior and commanding officer." (R. 81-85.)

"It is the purpose and intention of the Defend, R. S. Sterling, Governor of Texas, to enforce and administer Martial Law in the counties of Gregg, Upshur, Rusk and Smith, in the State of Texas, so long as he deems this necessary in order to suppress insurrection, tumult, riot, and breach of the peace in said counties, and so long as he deems it necessary in order to prevent insurrection, tumult, riot and breach of the peace therein, and so long as he deems it necessary in order to enforce and uphold in said counties the majesty of the law; and that it is his further intention to lift Martial Law from said counties as soon as it can safely be done with relation to the existing emergency therein." (R. p. 86.)

The "Proclamation" of the Governor of date, August 16, 1931 (R. 90-93) is referred to by Appellants as merely declaring "a state of insurrection, tumult, riot and breach of the peace to exist" in the Counties of Gregg, Upshur, Rusk and Smith. Therein and thereby the Governor did declare that certain conditions (described in preceding parts of Proclamation) exist in the counties named and that "by reason of this the conditions contemplated in Article 5889 of the Revised Civil Statutes of Texas of 1925" existed in those counties. The Statute thus referred to (i.e. Article 5889) declares:

"Whenever any portion of the military forces of this State is employed in aid of the civil au-

thorities, the Governor, if in his judgment the maintenance of law and order would thereby be promoted may, by proclamation, declare the county or city in which the troops are serving, or any special portion thereof, to be in a state of insurrection."

The recital just mentioned is followed in the Proclamation by the following declaration (R. 93):

> "And I do hereby declare Martial Law in said territory, effective at six A. M. the seventeenth day of August, A. D. 1931; and I hereby direct Brigadier General Jacob F. Wolters to assume supreme command of the situation in the territory affected and without delay shut down each and every producing crude oil well and/or producing well of natural gas, and to further take such steps as he may deem necessary to enforce and uphold the majesty of the law, subject to the orders of the Governor of Texas and Commander-in-Chief of the military forces of this State, as given through the Adjutant General."

The aforesaid declarations of the existence of "insurrection" and of "martial law" were (in the proclamation) based upon certain "Whereases" or declarations, to-wit: First: That "oil and natural gas or natural resources of this State" and the preservation and conservation thereof are made public duties and "waste"t hereof is prohibited by Statute effective August 12, 1931 (R. 90). Second: "An organized and intrenched group of crude petroleum oil and natural gas producers" in said counties "in a state of insurrection against the con-

servation laws of the State * * * and/or in open rebellion against the efforts of the constituted authorities of this State to enforce such laws" (R. 90-91) and by reason of reckless, unlawful, etc. "handling of producing wells in said district water is being rapidly drawn into the oil sands * * * creating enormous physical waste of crude petroleum oil and * * natural gas" with consequent "loss of revenue to this State" and injuries to educational institutions (R. 91). Third: "The existing condition has brought about a state of public feeling on the part of citizens that if the State Government cannot or fails to protect the public interest and the interest of land and royalty owners, they will attempt to take the law into their own hands and by force or arms shut down producing oil wells in said defined district until the State can and will enforce the conservation laws" and "this condition has caused threats of acts of violence on the part of indignant, responsible citizens against those who openly, flagrantly and rebelliously violate the laws and defy the constitutional civil authorities of this State (R. 9-92). Fourth: Thereupon, it was declared, "a state of insurrection, tumult, riot and breach of the peace does exist in the defined area" and in addition thereto "there is now imminent danger of said insurrection * * * being extended not only in the territory heretofore described, but in other areas of this State where oil and natural gas

is being produced by operators who are obeying the laws relating to the conservation of crude petroleum oil and natural gas (R. 92). And, fifth, "It is necessary for the preservation of crude petroleum oil and natural gas in the defined district that the reckless and illegal exploitation of the same be stopped until such time as the said resources may be properly conserved and developed under the protection of the civil authorities and (by Section 10 of Article 4 of the Constitution of Texas) it is made the duty of the Governor to "cause the laws to be faithfully executed," and by Section 7 of Article 4 of the Constitution of Texas, the Governor is given "power to call forth the militia to execute the laws of this State" (R. 92).

Appellants placed themselves and other witnesses upon the stand to prove conditions. But the proof, without dispute, shows there was no "insurrection" on or after August 16, 1931; its maximum import is that certain "land-owners," "royalty owners" and "operators" had become somewhat "excited" about supposed prospective losses to them unless there was enforced restriction of oil-production and, vaguely, threatened to "take the law into their own hands." R. 368-9, 284, 285, 296-7, 298, 300-301, 304, 305-6, 335, 336, 337-9, 341-3, 352, 353, 358-9, 360-2, 363-4. The proof, without dispute, shows that all courts,—State and National,—were at all times

open and functioning and that there had not been any obstruction of their processes. R. 301-3.

The trial court found, as facts: "The claim" that "war conditions were prevailing in the field" and that "military necessity required the action" taken is "wholly without support in the evidence;" at "no time has there been any actual uprising in the territory,—at no time has any military force been exerted to put riots or mobs down;" there was never "any actual riot, tumult or insurrection, which would create a state of war;" "the evidence shows no insurrection nor riot, in fact, existing at any time, no closure of the courts, no failure of civil authorities; the claimed "belief" that restriction of oil-production was necessary to keep down "riot or insurrection" has "no warrant in the evidence." R. 108, 109; 57 Fed. 2d 231.

In a practical sense there was not on August 16, 1931, or for some time thereafter, any statute in effect undertaking either to restrict production of oil or to authorize the Railroad Commission of Texas or other officers to cause such restriction. The statute referred to in the "Executive Proclamation" of August 16, 1931, (R. 90-93),—i.e., the "Conservation Law" so-called,—was passed and approved August 12, 1931. It is known as "Chapter 26, Acts of the Forty-Second Legislature, first Session, 1931." It does not purport to be self-execut-

ing in any respect; but if in this there be error, the proof (Appellees' verified Bill introduced in evidence) is that Appellees had not violated any of its terms,—that is, they had not committed "waste," etc. So-far-as restriction of oil-production is concerned, at least, the statute makes its operative effect dependent upon findings and orders made by the Railroad Commission and enforcement of the statute is placed, exclusively, within the power and discretion of the Railroad Commission. MacMillan vs. Railroad Comm., 51 Fed. 2d 400; Henderson vs. Railroad Comm., 56 Fed. 2d 218; Moore vs. Bell, 95 Texas 151, 66 S. W. 45; Wexler vs. State of Texas, 241 S. W. 231; Wichita Railroad & Light Co. vs. Public Utilities Comm. of Kansas, 260 U. S. 48, 58, 59.

II

SUMMARY OF ARGUMENT

A. The Trial Court, expressly or impliedly, found: First, that there was no "insurrection" or "riot," in fact, at the time of the declaration of martial law; second, that there was not at any time warrant for alleged belief of the Governor, et. als., that riot or insurrection would ensue if oil production was not restricted; third, that the Courts—State and National—were at all times open and their processes at all times were unobstructed—"the refusal of defendant Wolters to observe the

injunction in this case" being the only instance wherein there has been interference with the "civil authorities or courts * * * or their processes" (R. 108, 109; 57 Fed. 2nd, 227, 231).

B. The so-called "Executive Proclamations" (R. 93), the Appellants' pleading (R. 81-86) and the proof amply warrant said findings.

C. The due process clause of the Fourteenth Amendment precludes existence of an "irrebutable presumption" in favor of State action or action of State officers.

D. The constitution and statutes of the State of Texas do not confer upon the Governor of the State the power to declare or maintain "martial law" or to do or cause to be done the acts of which complaint is made.

E. If, as and to extent that any statute of the State of Texas undertakes to confer any such authority upon the Governor of the State, such statutory provision is void because it conflicts with the Constitution of the State of Texas and with the contract, due process and equal-protection clauses and other provisions of the Constitution of the United States.

F. Even if the Constitution and/or statutes of the State of Texas undertake to confer such author-

ity on the Governor of the State and/or his subordinates, the acts and conduct of the Governor of the State and his subordinates (of which complaint is made) were and are arbitrary, capricious, oppressive and unjust, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

III
ARGUMENT

The Courts were open in the territory which became the "military district." There was no obstruction of the processes of the Courts. A single exception is Appellant Wolters' refusal to yield obedience to the restraining order entered in this cause by the District Court of the United States. This was found as a fact by the Trial Court (R. 108) and it was declared, also, in the testimony of Appellant Wolters. (Record 301-302).

"At no time has there been any actual uprising in the territory" and "at no time has any military force been exerted to put riots or mobs down."

There was "never any actual, riot, tumult, or insurrection * * * but * * * if all the conditions" which the Governor and his witnesses described as threatened "had come to pass," they would have resulted merely in breaches of the peace * * * and

not at all in a condition consisting of or remotely resembling a state of war." There is "no warrant" for the "belief" (professed by Appellants) that "riot or insurrection, in fact a state of war, would ensue" unless Appellants had taken the action (complained of) to restrict the production of oil "down to within 400,000 barrels." There has not been at any time "any condition resembling a state of war." Such were the findings of the Trial Court (R. 108-09; 57 Fed. 2d, 231) and each of those findings has the support of undisputed evidence.

As we read their Brief, Appellants do not claim either that the above described findings of the Trial Court are without support in the proof, or that there is in the record any evidence whatever to support a different view. We respectfully submit, therefore, that the findings reach this Court with, at least, "presumption of correctness" (United Shoe Machinery Company vs. U. S. 258; U. S. 451, 455, Halsell vs. Renfrow, 202 U. S. 287, 291-2); and that presumption, we think, will be rendered conclusive by any review of the proof.

In truth, that which Appellants claim to be irrebutable proof of existence of "insurrection" wears upon its face manifestation of its inherent vices. They plead the "Executive Proclamation" of August 16, 1931, as such proof; yet that document (R. 90-93), at least when read with the practical interpre-

tation given in Appellants' Answer (R. 81-85), affirmatively shows that "riot" and "insurrection" did not exist and that, therefore, the Governor did not form or declare any judgment whatever based in discretion,—unless and contrary to all reason (Osborn vs. United States Bank, 9 Wheat. 737,863; The Styria vs. Morgan, 186 U. S. 1, 9) "discretion" or "judgment" may signify "arbitrary will," "mere caprice" or "inconsiderate action." If, therefore, we agreed (and we most emphatically disagree) with Appellants' contention of possibility of existence of an "irrebutable presumption" in favor of State offcers, we might yet properly contend that the instrument adduced to establish the presumption destroys, by its own terms, all reasonable bases therefor. And we might, then, properly analogize:—A judgment of a court of competent jurisdiction which correctly recites necessary jurisdictional facts or which remains silent in respect thereof is, ordinarily, immune to collateral attack; but what of a judgment which recites facts negativing jurisdiction or which generally declares jurisdictional steps to have been taken and, then, describes insufficient or improper steps as those which were, in fact, taken? (Galpin vs. Page, 18 Wall, 350, 366; Settlemeir vs. Sullivan, 97 U. S. 444, 447).

By introductory sections of the instrument claimed bases of the Governor's action are described.

Reference is there made (R. 90, 91) to the "Conservation Law", approved August 12, 1931. Of that statute (Ch. 26, Acts of Forty-Second Leg., 1st Called Session, 1931) at least two things ought be noted here: First—It repealed pre-existent conservation laws. Second—Its practical-effectiveness depended upon findings and orders made (after notice and hearing) by the Railroad Commission of Texas (R. 139; 57 Fed. 2nd 242; MacMillan vs. Comm., 51 Fed. 2nd 400; Henderson vs. Comm., 56 Fed. 2nd 218; Moore vs. Bell, 95 Texas 151, 66 S. W. 45; Wexler vs. State of Texas, 241 S. W. 231; Wichita R. R. & L. Co. vs. Public Ut. Comm. of Kansas, 260 U. S. 48, 58, 59)—and, the Proclamation (R. 91) shows, no such findings or orders were in existence. The Proclamation, read with relevant terms of the statute to which reference is made therein and the "general law," discloses,—if, indeed it does not affirm,—that the declaration (R. 90) of existence of "an organized and intrenched group of * * * producers * * * in a state of insurrection against the conservation laws of the State" and of existence of "a state of insurrection" because thereof (R. 92) were untrue,—and the untruth thereof must have been known to the Governor unless abysmal ignorance is to be assumed. But if in this there be error and if it be true that violations of the "Conservation Law" were then possible and existent, the fact remains that the statute provided for its enforce-

ment by means (e. g. penalty and/or injunction suits) other than action by the Governor,—and all of the courts were open and their processes unobstructed (R. 108, 301-302); whatever else those "violations" may have been, they did not constitute "insurrection" (Ex Parte Milligan, 4 Wall. 2, 127, 18 L. Ed. 281).

The other basic recitals of the Proclamation are, in terms, given relation to what might happen in the future. E. G.,—"The existing condition" (i. e., alleged violations of the "Conservation Law") "has brought about a state of public feeling on the part of citizens, that if the "State government cannot or fails to protect the public interest and the interest of the land and royalty owners they will attempt to take the law into their own hands and by force of arms shut down the producing oil wells in said defined district." (R. 91-92).

That the meaning of the Proclamation, as understood by the Governor, is such as we have described is made plain by the practical interpretation given in the positive averments of Appellants' Answer (R. 81-85).

Hence, (we say) the Proclamation itself (i. e., that which Appellants present as evidence for "irrebutable presumption") disproves lawful use of lawful discretion or judgment (if any) by the Gov-

ernor. For it deals with and discloses, as basis for the Governor's act of claimed "discretion," a mere threat or fear of "insurrection" rather than a then-existent "insurrection." And, thus, it proves there was no warrant for "martial law" or for executive or military action, if any, lawfully predicable upon supposition of actual tumult; for "the necessity must be actual and present,—the invasion real, such as effectually closes the courts and deposes the civil administration" (Ex Parte Milligan, 4 Wall, 2, 127, 18 L. Ed. 281).

The situation thus existent at the beginning of martial regime stayed unchanged throughout the period.

Thus, it came to pass, lack of any basis in fact for the claim of warrant for the Governor's action or alleged uses of "discretion" was proved in the Trial Court in each and both of two ways:—First, —By the "Executive Proclamation" which was offered in defense; second, by extrinsic evidence. And that proof is summarized and given emphasized point in the findings (actual and presumed) made by the three judges who considered the document and who heard and observed the demeanor of the many witnesses (including Appellants) who testified relative to the matter.

And that which was a mere fiated "insurrection"

has been taken as warrant: First,—for calling out military forces; second, for use of those forces to deprive Appellees of the use and benefits of their properties; third, for thwarting and annulling the decree and process of the District Court of the United States and depriving Appellees of the benefits of such decree. As litigants, Appellees may not be interested in the matter of merely calling out the military and, arguendo, it may be assumed that the Governor has unchallengeable authority to do that; but they are vitally interested in the manner and extent of the use of soldiers to take their property and/or to thwart judicial orders made for their protection. Even if there were a presumption which excluded inquiry as to why troops were called out, still, they say:

First,—Use of soldiers to annul judicial orders (such as were made in this cause October 13, 1931) is in contempt of that provision of Sec. 2 of Art. VI of the Constitution of the United States wherein it is declared that such constitution and laws made in pursuance thereof shall be the supreme law of the land, and of that term of Sec. 1 of Art. III of the Constitution whereby the "judicial power of the United States" is vested in certain courts and of that part of Sec. 2 of Art. III wherein it is provided that "the judicial power shall extend" to cases in law and equity arising under such constitution

and laws made pursuant thereof, and of the terms of the laws of the United States creating the District Court of the United States in and for the Eastern District of Texas and vesting it with jurisdiction of such cases as that now presented. Such jurisdiction became *active* October 13, 1931; and, as a matter of course, it has not been suspended or destroyed, by reason of any action or non-action suffered in the cause. Yet by fiat of the Executive of another government, that jurisdiction has been invaded, interfered with and declared to be impotent. Its invocation and its exertion on October 13, 1931, was taken (according to the pleading and undisputed proof) as warrant for "martial law",—as continued or as re-inaugurated. That is to say, the Governor of Texas declared, and the other Appellants assumed (and acted upon the assumption), that the powers of the United States are wholly insufficient for enforcement of an order of its court and/or that those powers are wholly insufficient to put down or prevent "insurrection" (claimed to be) consequent or threatened as consequent of that court's act and that the more powerful Governor of Texas must thwart the impending catastrophe by forbidding obedience to the court's order. The supposed practical effect of the court's order and the supposed error or improvidence thereof, it will be remembered, were not presented to the court itself, as might have been done regularly and in decent

respect for orderly government; on the contrary, the actual effect was commanded (by ipse dixit of an Executive officer of the State) to be ignored and defeated, and that remarkable command is as yet outstanding,—even more, Appellants, in their Answer (R. 81-85, 86), say that they expect to keep the command outstanding and to have it executed for an indefinite future time. Of the spectacle thus presented it may justly be observed: (a) If it has anything like a precedent in history, that must have occurred upon actual subjugation, by conquering armies, of the people of whose government the thwarted court was a part. (b) It demonstrates beyond peradventure of doubt, we say, that the Governor and his subordinates have been and are acting in effort to restrict production of oil for the purpose of affecting its values (a purpose made unlawful by the Texas "Conservation Statute") and not for the purpose of preventing riots, disorder or "insurrection" and not for the purpose of causing the laws to be executed,—it manifests its badge of bad-faith or caprice, and amongst the things which it proves is the fact that the Governor did not exercise a "discretion" or form a "judgment" within his authority but, contrarily, refused to use "discretion" (if any he had by law) or to form a "judgment".

Second,—The Fourteenth Amendment (in the due- process clause) warrants inquiry as to neces-

sity, in fact, for taking or destroying Appellees' property and rights. We say that because, we say, the Amendment operates alike against the Executive, the Legislative and the Judicial departments and agencies of a State (Virginia vs. Rives and Ex Parte Virginia, 100 U. S. 313, 339, 346, 25 L. Ed. 667; United States vs. Lee, 106 U. S. 196, 29 L. Ed. 171; Home Tel. & Tel. Co. vs. Los Angeles, 227 U. S. 278, 57 L. Ed. 516), because arbitrariness in State action mocks due-process (Yick Wo vs. Hopkins, 118 U. S. 356, 370, 30 L. Ed. 220; Barbier vs. Connally, 113 U. S. 27, 31; M. P. Ry. Co. vs. Humes, 115 U. S. 512, 519; Dent vs. West Virginia, 129 U. S. 114, 123-4; Myres Salt Co. vs. Iberia Dr. Dist., 239 U. S. 478), because perversity of judgment on known facts or judgment or action on "facts" directly feigned or which(in ordinary intelligence) are known to be shammed is, essentially, arbitrary and because liberty or property rights cannot be duly subjected to the unbridled will of any functionary of government (Yick Wo vs. Hopkins, supra; Spann vs. City of Dallas, 111 Texas 350, 360, 235, S.W. 513). And while in the laws of many States verbal obeisance is yet made to phantom kings, a necessary effect of the Fourteenth Amendment is preclusion of all vestige of absolute official privilege. With the sweep of the Amendment (as described in Ex Parte Virginia and other cases just cited) in mind and in broad illustration of its

effect against absolutism, we repeat this eloquence, —pronounced with the return of Arlington (then used by the United States as a military reservation and as a National cemetery) to the Lees:—

> "There is in this country no such thing as a kingly head as to the nation or to any of the states which compose it. * * * No person in this government exercises supreme executive authority. * * * Under our system * * * the people are sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." (United States vs. Lee, 106 U. S. 196.)

The Constitutions, and particularly the Fourteenth Amendment with its restraints on State action, are laws for 'rulers and people, equally in war and in peace', "at all times and under all circumstances." (Ex Parte Milligan). And lest we be thought somewhat intemperate in hatred of a concept of power in governmental agents to halt the due sweep of Liberty, we point to the sentiment of Justice Davis and paraphase his words: "No doc-

trine, involving more pernicious consequences, was ever invented by the wit of man than that any of the provisions of the constitution can be suspended during any of the great exigencies of government." (Ex Parte Milligan).

The argument of Appellants is marked by glaring inconsistency:—In one phase, it is claimed that the matter of actual necessity for taking property or suspending rights thereof may not be challenged,—i. e., existence of necessity and consequent legality is an "irrebutable presumption." In another phase, however, it is admitted that such a judicial inquiry may lawfully be made after the war is over and damages may then be recovered for wrongful taking of property,—this admission having been induced, no doubt, by a consideration of what was said in Mitchell vs. Harmony, 13 Howard 115, 133-134, and in United States vs. Russell, 13 Wall. 623, 628. The basic purpose of the inquiry in either case is that of determining whether the act complained of was lawful. The argument, then, is that the courts are limited as to remedies rather than that they are without power to make the basic inquiry. So much is indicated on page 47 of Appellants' Brief (in No. 746) where it is suggested that "the remedy of Appellees" is that of suits for damages prosecuted after the military forces shall have rested from their trespassing. And that suggestion is made despite the fact that Appellants are not

able to respond in damages!

But we have some book-proof to the point that the courts are able, by application of proper remedies, to halt trespassing soldiers even when they are parading in martial regime:—By write of *habeas corpus ad subjiciendum* (Ex Parte Bollman 4 Cranch 74) Milligan was taken from custody of the military men and put in the custody and at disposition of the court (Ex Parte Milligan, 4 Wall. 2, 18 L. Ed. 281) as were Turman (Ex Parte Turman, 26 Texas 708) and Peebles and others (State vs. Sparks and Magruder, 27 Texas 627, 705). The power to issue and enforce habeas corpus and, thus, to interfere with military operations, is certainly no broader than the power of a court of competent jurisdiction to apply and enforce other remedies,—e. g., injunctive process. And the general answerability for excessive, oppressive or perverse user of military power (even where "Martial Law" is properly in force) is declared in Luther vs. Borden, 7 Howard 1. On page 67 of their Brief (in No. 453) Appellants assume a case of actual war and upon that assumption present a question:

> "If the military forces in the field under declaration of 'martial law' are faced by the armed forces of insurrection and the officer in command orders his men to fire, is the Chancellor going to stand by and issue a temporary restraining order or intelocutory injunction to re-

> stratin the men from placing their forefingers upon the triggers of their rifles until in the quiet of judicial proceeding the pleadings can be heard, facts reviewed and a solemn judgment arrived at and entered as to the necessity for the command?"

The Supreme Court of Texas (in State vs. Sparks and Magruder, 27 Texas 627, 705, etc.) answers that the courts, at least, could take the targets away even when actual war prevails; and Ex Parte Milligan signifies that the Court can deprive the firing-squad of its intended victim, at least when "Martial Law" rests on mere fiat.

And whatever may be the law in Colorado or elsewhere, the law in Texas is that the courts may, at least "in a clear case," inquire into and interfere with use of "discretion" claimed to have been exercised in respect of war-measures, for (in Ex Parte, Mayer, 27 Texas 715, 719) it said:—

> "The power to raise armies has been exercised on grounds supposed to be proper by the party who is to judge of its propriety and necessity, and the presumption is not to be indulged that the power has been perverted, or that its exercise will be abused in a way to defeat rights secured by the constitution or reserved to the states; or, in other words, it must be a clear case of violation that will warrant the interference of the courts."

And previously (in Ex Parte Coupland, 26 Texas

387, 404-405) it was said, of the power to raise armies as used by those to whom authority to "judge of * * * propriety and necessity" had been given, that "though the necessity exists today, and the law is therefore constitutional, if tomorrow that necessity should cease, its continuance would be as clearly unconstitutional".

By those who sought unlawful death of Milligan (Ex Parte Milligan, 4 Wallace 2, 18 L. Ed. 281) it was claimed that martial law covered with its broad mantle the proceedings of their military commission; a like justification is hereby asserted by the Governor and General Wolters. That contention has its answer in what has been said already; it has its unyielding answer in the principles announced and applied in Ex Parte Milligan; yet, because of the emphasis with which it is pressed, we will give it detailed consideration in the pages which are to follow.

> **"Martial Law":—(a) The impossibility of lawful martial rule in Texas at any time, under any circumstances, by warrant of State action; (b) alternatively — the impossibility of lawful martial rule in Texas at any time, under any circumstances, upon EXECUTIVE ACTION alone; (c) further and alternatively—the arbitrary character (hence, the illegality) of the instant martial rule.**

By pleading, in testimony and by argument the

Court has been tendered the asserted paradox of co-existent executive absolutism and constitutional government. The essence of a paradox, it is to be remembered, is its truth,—actuality despite apparent impossibility; hence, we inquire about the foundation of the claim or whether there be left in the people of our country any of that liberty under law which has been our cherished supposition.

THE BASIC QUESTION POSTURED

No foot of Texas soil wears print of invader's heel; no breeze that ripples our woods or courses the plain kisses, to waft, a rebel flag; yet war is fiated on high, and a subjugated principality, eo instanti, writhes in imperious will of epaulated satrap.

Pursuit of happiness wends its tranquil way and insurrection's wild alarm assults not the public quiet; Justice is established, the courts are open and their processes, State and National, go unhalted and in undiminished vigor along the highway, upon the byway, into the hedges, whithersoever there be need; regimen exhibits its pristine efficacy and none there is, with hardihood abysmal, to deny existence of that Peace in whose aegis is wrapped the blessings of liberty. Yet a sudden Joshua, new born but stripped of ancient power, essays conjury and fanciful presentment of things not seen, hurls brutem fulmen at un-offending Sun in martial ex-

pectation that radiant day, on the moment, wear melancholy night's most sable robe. Mystic alchemy turns government of law to regal discretion, unrestrained and unchallengable as is unbridled and unquestionable the "multitudinous laughter of the sea." The prince's will, be it sane or insane, be it corrupt or be in pure, is now the law; at his contempuous demand sheriffs, marshals, judges, courts, all constituted authorities, must "crook the pregnant hinges of the knee" that life may "follow fawning." Privileges of origin more remote, even more respectable, than written law are suspended; rights bottomed in fundamental law must be yielded; even that liberty which comes with a man's being from the Creator and for whose integrity constitutions thrust forth the shields of their protection must be suppressed; and all walks in the train of martial Ipse Dixit.

For the existent condition American history affords no parallel, since in event of "martial law" heretofore transpiring those in assumed command had, at least apparent fact-situation of actual and wide-spread violence or apparent color of municipal law, whereas presently in Texas there is no violence in fact and only a fiat of that which every man knows is false to support the claim of right (by implication) to legalize treason and to put upon official banditry a caparison of respectability. The unchal-

lengable "fact" is that there is no isurrection; at most or worst, perfervid Imagination might erect on the "facts" anticipation of violence at some un-ascertainable place at some unknowable time, as it might do, indeed, on "facts" as they exist at any given time. Imagination, real or feigned (and, if real, sane or morbid) may, then, and according to the claim made, substitute executive absolutism for ordinary course of government and those whose rights are swept away may not, even in open courts, complain. Stripped of all deceipt, the basic syllogism is this: Martial Rule, during its period, is the sum of all power; the Executive, by his unchallenbeable fiat, may create the occasion and period and, thus, don Sovereignty itself,—bringing to pause all other regularly appointed agencies. Such "theory" of the Appellants is manifest in their propositions:—(a). "Martial Law is the supreme exercise of the police power," "Martial Law is the will of the commanding officer". (b) "The "Governor's proclamation established the fact of an isurrection and the necessity for Martial law," "The Governor's declaration that a state of isurrection exists cannot be controverted by anyone and cannot be questioned or reviewed by any court", The Governor necessarily must determine the necessity of declaring Martial Law, his determination is final and conclusive." (c) "During the existence of an issurrection the officers of the army should not be disturbed and harrassed

by law suits."

The basic question has been rightly postured. But if there were doubt that the claim or the actuality is as described, it ought yet be remembered that what, in fact, has been done may well be but the commencement and that, if what *has been done* can be justified, all *that may be done* is likewise justifiable. If the power exists at all, the very reason for its existence precludes all jural limitations on its active ranges, for the 'constitutional validity of law is to be tested not by what has been done under it, but by what may rightfully be done by its authority' (Montana Mining Company vs. St. Louis Mining, etc., Company, 152 U. S. 160, 172, 38 L. Ed. 398, 14 Sup. Ct. 506).

And in approach to consideration of the basic question it ought be remembered that what may lawfully be done by a conquering army in an alien field (except for its limitations) is beside the instant point, for we are confronted with military occupation at home. What may be done by an army in actual clash of force at home or abroad is likewise (except for its restrictions) an immaterial consideration, for we have peace and the utmost adversely claimed is that there might be violence but for martial staying of the ordinary processes of law. The militia has not been called out to execute municipal law; that is neither the purport nor the practice, for,

in such event, the military force would obey and not contemn what the civil law directs. The power to suspend municipal law and to substitute for it substantive, judicial and administrative provisions and means of enforcement is asserted and, in fact, exercised. Through bald assertion and actual conduct, the military is exalted above the civil authority and in the exaltation of the one and in the debasement of the other there is, ex vi necessitate, suspension of law witnessed by immemorial usage, declared by statutes and ordained in constitutions.

Whence proceeds this over-weening power that is claimed? By what privilege does it wear the tyrant's mien? The answer attempted is that there is an executive authority which is supreme and the Governor is its respositary. Otherwise stated: Recrudescent Louis XIV issues from universal charnel-house to re-proclaim, for the nonce, "I am the State."

If the conduct which now engages attention may be supported on a different postulate, grasp of the idea, we freely admit, is beyond our ken.

We are here to blast away at the Anomaly's foundations and to challenge its right to live for a single instant on soil dedicated in the sacrifical blood of freemen to the unending uses of freemen. If in the attempt resort is had to masculine language, warrant lies, we think, in the outrage which,

in our view, the paradox tenders to Justice and the insult which the anomaly thrusts at Common Decency.

THERE IS (EXCEPT IN THE PEOPLE) NO SUPREME POWER

To make is impossible that there should be in any officer or in all officers combined supreme authority of any kind was a particular objective of those who erected our State and prevised its maintenance. With this objective in mind and conscious of historical unsurpations which had resulted from allowing maxims of freedom to rest in implication, they first described as set apart unto all of the People, as contrasted with those who should wear the State's livery, a great body of liberties. Those rights were pronounced sacrosanct; and for them a perpetually inviolable character was decreed; all privilege of their impairment was expressly reserved to the People and excepted out of the "powers of government;" and, by way of emphasis, it was declared that "all laws contrary thereto * * * shall be void." The freedom and safeguards of liberty thus ordained in the Bill of Rights (Art. I, Const. of Texas) were given sacred character, it was said, in order to "guard against transgressions of the high power * * * delegated," whether legislative, executive or judicial. That freedom and its means must be protected at all hazards and against all efforts at its rape, else organized gov-

ernment is banditry and its minions outlaws. Supreme public policy is, so, organically declared, and its pronouncement ought not be circumvented through brazen unsurpation or pharisaical indirection, nor ought it be given an attenuated strength in response to vagrant notions of the general welfare or, it may be said, of public safety. Unless and until changed in the sovereign manner it is and must remain the unchallengeable declaration of what is general welfare and of what must not be violated even (upon claim) for "public safety." Existence and meaning of the Bill of Rights (if it be given meaning at all) projects thought of alternative phase: Either general welfare and public safety can be adequately served without contempt of its requirements or its restrictions or, else, the country is "not worth the cost of preservation" if its preservation must be "at the sacrifice of all the cardinal principles of liberty." (Ex Parte Milligan). *Ita lex scripta est.* The fundamental law of our jural creation being thus written, its vindication by all proper opposition to assaults upon it is a high duty of citizenship and the highest duty of the courts. The duty to observe valid laws is no higher than the duty to oppose invalid statutes or unwarranted conduct of officials. Human nature is such as to make anarchy a sure resultant of failure to observe the one duty and tyranny an inevitable consequence of negligence in the other respect.

This much has been said to express the truth that the words of the Bill of Rights, for sound reason and in right intendment, carve out from Sovereignty a vast body of power and leave it otherwise untouched in the People of Texas as an entirety and as contra-distinguished from the sum of power vested in the three Departments. The State of Texas is not the Legislature, nor its Executives, nor its Judiciary, nor yet all these combined. No more has all legislative power been delegated to the Legislature, nor all judicial power to the Judiciary, for, as remarked, a vast sum of each yet resides in the People. The People of Texas is the State of Texas, and any law or action which advances a different view, however good the immediate desires and objects of its movers, is no law or lawful action at all, but is bald usurpation. Pretence to absolutism by any officer or group of officers at any time or place is an intolerable claim whose monstrous character is denounced in every syllable of the Bill of Rights.

"Executive authority" or "Supreme Executive authority" in the sense in which the term is used by our adversaries, in the sense, indeed, in which they must use it in attempted justification of what has been done and is purposed, means no more and on less than power to suspend municipal law, inclusive of constitutional provisions apparently expressing sovereign will to the contrary. Martial Rule cannot exist, *e. g.*, save by way of suspension of Habeas

Corpus and its privileges. "Martial Rule" and unsuspended right to Habeas Corpus do not co-exist. Ex Parte Field, 5 Blatch. 63. The necessity of halting *Habeas corpus* process in order that "Martial Rule" may be efficacious is the theme of (or has recognition in) almost every case to which Appellants refer. To like effects are views of the bookmen: "Suspension of the writ of habeas corpus is essentially a declaration of material law." Messages and Papers of the Presidents, Vol. 10, p. 465. "Promulgation and operation of martial law within the limits of the Union would necessarily be virtual suspension of the habeas corpus writ for the time being." De Hart's Military Law, 18. "The declaration of martial law in the state has the effect of suspending it." Cooley, Const. Lay, 301. "Practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of habeas corpus, that is, the withdrawal of a particular person or a particular place or district or country from the authority of the civil tribunals." Halleck, International Law, chap. 15, p. 375. See also May's Const. History, chap. 11. (p. 1006-7). Again: Promulgation and enforcement of "Martial Rule," *ex vi necessitate*, operates suspension of constitutional and statutory rights and remedies and laws therefor providing and, at once, manifests assumption by the Executive of legislative and judicial power. Such being (and such being the results of) the authority

claimed for the Executive, its assertion would provoke the thought that a power so astounding in its scope ought have witness in expressed grant if it have support at all. Certainly a reasonable mind would eschew the claims unless its proponent were able to prove a grant in expressed terms or by implications so clear and imperative as necessarily to preclude all doubt of existence of the power. Our adversaries, we think, cannot show existence of the power in any Executive in America or in any functionary elswhere save, perhaps, in those few countries wherein government yet wears the acknowledged form of absolute depotism. But if in this it be found we are mistaken and if it be found that somewhere American soil yet nurtures regal power despite of the Fourteenth Amendment, this will but develop the fact that Texans are distinctively free men under protection of a Constitution whose terms widely differ from the provisions of Constitutions of those States, if any, wherein Executives are supreme. We remark, in passing, that peculiarities of the Texas Constitution (to be developed at length presently) render inapplicable most, if not all, of the "authorities" cited by Appellants even if such "authorities" be regarded as sound law.

The illogic of a "supreme executive authority," or existence of such authority as Appellants claim, includes false premise laid on misconception and misapplication of the rule of construction (stated in

Martin vs. Mott. 12, Wheat 19, 6 L. Ed. 537, and in Luther vs. Borden, 7 How. 1, 12 L. Ed. 581) to effect that:

> "Whenever a statute" (or a constitution) "gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts * * * the statute" (or constitution) "considers him the sole and exclusive judge of the existence of the facts."

Of this rule generally it is to be remembered that (wherever applicable) it includes pre-supposition of lawful vesting of the power with which it deals and that its sound converse is that exercise of claimed "discretion" without the lawfully vested power is mere usurption challengeable anywhere and at any time. In respect of application of the rule to the doings of State officers it ought be remembered that (since Martin vs. Mott and Luther vs. Borden) the Fourteenth Amendment has interposed insuperable obstacles to existence or exercise of arbitrary power. And, as immediately touching the instant situation, these things are worthy of initial notice and continued recollection: First, our adversaries do not and cannot point to any *expressed* grant of the authority claimed; second, the power, if it exist at all, rests in *implication;* third, they blandly assume existence of the necessary implication and, thus, assume as settled the very question at issue. It is important, therefore, for us to examine the specific grants of power

as made in the relevant statutes and in the Constitution, the specific denials of power and the expressed and implied restrictions of powers actually granted. For if it be true that the Governor acted either without or beyond lawful jurisdiction, his proclamations are mere words without even the dignity of an ukase. A like resultant occurs if he has acted consonantly with a statutory grant and if the statute is in conflict with organic law.

POWER ACTUALLY GRANTED HAS DEFINITE RESTRICTIONS

With these general observations taken, we come now to particular notice of definite grants of restricted executive power and definite prohibitions of unchallengeable authority.

A. RELEVANT STATUTES

The "Conservation Law" (Ch. 26, Acts of Forty-Second Leg., 1st Called Session, 1931) remits to the Railroad Commission (and, thus, withholds from the Governor) discretion as to means and occasions for enforcement of its terms,—as has been pointed out in another connection above. A necessary result is that authority or "discretion" to enforce that statute by use of the military force or to predicate "martial rule" on its alleged violation is denied to the Governor.

The statutes cited and relied on by Appellants (pages 27-30 of their Brief) are those next discussed.

Art. 5778:

> "The Governor shall have the power in case of insurrection, invasion, tumult, riot or breach of peace, or imminent danger thereof, to order into active service of this State any part of the militia that he may deem proper * * *"

This statute in its grant or definition of power, as is manifest, has no relation to what use is to be made of the militia after it has been ordered "into active service."

Art. 5830:

> "When an invasion of, or an insurrection in, this State is made or threatened, or when the Governor may deem it necessary for the enforcement of the laws of this State, he shall call forth the active militia or any part thereof, to repel, suppress, or enforce the same, and if the number available is insufficient, he shall order out such part of the reserve militia as he may deem necessary * * *"

The language there used is not:—"When the Governor deems an invasion or insurrection to exist." The language used is:—"When * * * an insurrection * * * is made or threatened" the Governor "shall call forth the active militia * * * to suppress * * * the same." Taken literally the language used means that a real, —as distinguished from imaginary,—"insurrection"

must exist or be threatened before the militia may be called forth. In any view, the militia is to be used to suppress "insurrection" in fact and not to set aside or suspend statutory and constitutional rights; and there is absence of a vesting of authority in the Governor to determine what means are to be used in suppressing insurrection.

Art. 5834:

> "The Governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners from and to any point in this State, or discharging other duties in connection *with the execution of the law* as the public interest or safety at any time may require."

The authority here given is that of assisting "civil authorities" in "execution of the law" and not that of making the law or setting it aside.

Art. 5889:

> "Whenever any portion of the military forces of this State is employed **in aid of civil authority,** the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any specific portion thereof, to be in a state of insurrection."

This statute does not purport plenary authority in the Governor to determine what means shall be em-

ployed after "a state of insurrection" has been declared.

Whatever authority is purported in Articles 5834 and 5889, supra, is predicated upon assistance to or aid of "civil authorities" as the purpose of calling-out or using troops, while "martial law" (and not "aid of civil authorities") is that which the Governor ordered and that which was put into effect. That the Governor and his subordinates assumed power to set aside existing laws, to make new laws and, then, to adjudge and execute new laws (or their own unrestrained will) is the plain meaning of this Record as well as the necessary admissions (directly or inferentially) made in Appellants' Briefs. E. G.,—That which the Executive Proclamation orders is "martial law" (R. 93); that which the General was ordered to do was "to assume supreme command of the situation" (R. 93); that which the military, in its first step, did was completely to "shut down" oil-wells (R. 283) although there is no pretense that *any* law required them to be shut down; amongst subsequent steps taken by the military were the making and enforcing of orders as to how much oil might be produced (R. 292-3, 302-3),—the Railroad Commission of Texas being the "civil authority," if any, given that power,—and the overriding of the District Court's restraining order entered in this cause (R. 288, 289, 291, 370-1, 372, 377, 378-381).

That the enterprise was and is "military," or intended to be such, was stated or implied: E. G., General Wolters:—

> "By orders of the Governor as Commander in Chief of the Texas National Guard, I was placed in charge of that field as the officer commanding the military forces there to enforce the orders of the Governor of Texas, and I am still so occupying that position."—(R. 282).
>
> "When we reached the oil field on the morning of August 17th, we had an order from the Governor to shut every well down. When we got there there were 1623 wells; the wells were flowing and my investigation disclosed that at least the last three days prior to our arrival produced approximately 1,400,000 barrels. We shut them down. They remained shut down until September 5th, from August 17th."—(R. 283).
>
> "The Witness: We shut the wells down."—(R. 286).
>
> "On the evening of October 13th William A. Vinson of this city was my guest at my headquarters. Approximately at 6 o'clock or a little past a newspaperman from Fort Worth telephoned me that Federal Judge Bryant, sitting at Tyler, had issued a temporary injunction restraining the Railroad Commission and myself from enforcing the order for the holding down of the allowable to 165 barrels. The newspaperman said that he did not want me to say anything about it, because he thought he had a scoop, that the other papers were asleep. To show my mental attitude about it I said, "I am afraid you are being spoofed; I don't believe

that Judge Bryant would issue a temporary order without notice in a matter of this importance."—(R. 288).

"Without going into the details, I reported to the Governor that an injunction had been issued according to reports that I had enjoining the Railroad Commission from enforcement of its order and enjoining me from enforcing their order. I stated to the Governor that if these wells were permitted to be opened at the rate of 5,000 barrels, there would be serious trouble, the adjoining operators and land owners as well would seek to take charge of them to stop it. He directed me then over the telephone to not permit the wells to run at more than 165 barrels, to cease following the orders of the Railroad Commission, but absolutely his orders. I told him that his orders would be complied with, but I wanted it in writing. Later in the evening his secretary telephoned me with the written order of October 13th. I sent out details and found the wells running open and shut them down."—(R. 288-289).

"I wasn't violating the Court's injunction; I obeyed the Governor's injunction."—(R. 291).

"In the performance of what I conceive to be my duties in the administration of this rule in the military district, I recognize no other authority except the Governor of Texas. So far as I co-operate and have anything to do with the ordinary civil authorities, it is merely by way of getting advice or taking it or leaving it as my judgment may dictate."—(R. 202-303).

And by terms of statute General Wolters was and is a "military officer" and is not a "civil officer." Ex Parte Dailey, 246 S. W. 91. And see 26 Texas 411.

With the Trial Court in this case (R. 119; 57 Fed. 227, 237), we say the statutes relied upon by Appellants are without any such grant of power as is claimed.

But if, as and to extent that such statutory provisions, or any of them, purport the broad and unreviewable authority contended for them by Appellants, the statutes are impotent because they contravene the organic laws of Texas.

The decision of the Supreme Court of Colorado in Re Moyer, 35 Col. 159, 85 Pac. 190, 12 L.R.A. (N.S.) 979, (referred to by this Court in Moyer vs. Peabody, 212 U. S. 78), that the Governor had not there exceeded his authority was predicated upon lack of 'expressed or implied' limitations upon adoption of means to carry into effect the expressly granted powers "to suppress insurrection." If therefore it be true (and we claim it is true) that the Texas Constitution includes restrictions as to "means" which may be taken in execution of the (supposed) general authority vested in the Governor, then the whole series of cases from Colorado and other jurisdictions relied upon by Appellants become wholly unavailing.

Presently, we shall attempt to point out such restrictions; but before doing so we again call attention to the fact that Texas law, as announced by

Texas courts acting under a constitution much less stringent than the present one in respect of expressed limitations of official power, permits judicial inquiry about "necessity," vel non, of use of asserted power. Ex Parte Coupland, 26 Texas 387; Ex Parte Turman, 26 Texas 708; Ex Parte Mayer, 27 Texas 715, 719; State vs. Sparks and Magruder, 27 Texas 627, 705; Emancipation Cases, 31 Texas 504; Manley vs. State, 137 S. W. 1137, 1141; Manley vs. State, 154 S. W. 1008. In the views of at least two of the three) judges, as expressed in Ex Parte Coupland, such a thing as valid "martial law" upon Executive action is wholly foreign to our system. And in a comparatively late case by a Court of Civil Appeals (Rose Mfg. Co. vs. W. U. Tel. Co., 251 S. W. 337, 339) it was said that "military power can only be exercised over the property of the citizen," if at all, "when the civil arm of the government becomes powerless"; "military powers over the citizen and his property are based upon and limited by necessity,—whenever this necessity ceases, such military power must end." In that case writ of error was refused by the Supreme Court.

B. RELEVANT CONSTITUTIONAL PROVISIONS

Such "powers of government" as are delegated at all (which, as already pointed out, are much less than the whole) are by terms of Article II, of the

Constitution of Texas, generally apportioned as between Departments; and by terms of Article IV such executive powers as are delegated are further generally apportioned as between different branches of the Executive Department. By other provisions of the Constitution executive powers are vested (or required to be vested by the Legislature) in officers to whom no reference is made in Art. IV, such, e. g., as sheriffs and other officers of counties.

Thus it will be seen: (a) That by existence and effect of Art. I of the Constitution only a part of executive authority is allowed to be vested in all offers combined; and, (b), that *but a part* of that part delegated at all is vested in the Governor. And nowhere in the constitution will there be found attempted expressed or implied grants of a supreme executive authority, and in this respect at least, our constitution differs widely from the texts of the constitutions of Colorado, Idaho, Indiana, Kentucky, Montana, Nebraska, Pennsylvania, West Virginia, etc., as will be pointed out in some detail presently. The general text and structure of our constitution negatives all ground for thought of existence of such a power and particular terms of the instrument, if given their plain meaning, deny its existence with a force which ought not be thwarted or rightly be given a circumscribed range.

And, *first*, we notice the affirmative grants upon

which the adversary must rely.

In Sec. 10 of Art. IV it is provided that the Governor "shall cause the laws to be faithfully executed." In Sec. 7 of the same Article it is provided that the Governor "shall have power to call forth the militia to execute the laws of the State." So far, of course, there is and can be no shadow of excuse for the pretense that he can interfere with operation of municipal law, at least in its substantive aspects. For, as was said of the President (with like grants of authority) in Ex Parte Milligan, the Governor "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." Manifestly, authority to fiat what the citizen shall do with his property, to what uses he shall put it, or to what extent his proprietorship shall be yielded or suspended cannot be deduced from the language of the grants just mentioned; and there is even less ground in these grants for the claim of authority to set judicial process at naught and to heap upon established and operating courts the contumely of unconcealed and defiant contempt. The authority claimed must proceed from a different source, if for it there be warrant at all.

It is claimed, we assume, that such warrant inheres in that language of Sec. 7 of Art. IV, wherein it is said that the Governor "shall have power to call forth the militia * * * to suppress insurrection." But,

it will at once be noticed, there is not here any expressed grant of authority to suspend or otherwise interfere with municipal law in or in connection with use of the militia to "suppress insurrection." In order to predicate that power on this term of the constitution at all, resort must be had to implication. The implication which is essential to justify present and threatened attempts to use that power does not, however, arise, and this, we think, is demonstrable.

In the first place, the implication (viewed and given application to existent facts) would not exist, even if this particular grant stood alone and unaffected by other provisions which may operate to restrict it. This is true because, on the undisputed facts, the courts are open; there is not an actual state of war or of insurrection, at most there is but attack or feint of harpies of Imagination suggesting *possibility* of violence. We repeat what has already been said: This (except for some contemporaneous swashbuckling in a neighboring State) is the first instance in American history that active exponents of "martial law" have not had for asserted justification an apparent condition of violence in fact (or an expressed authorization). And, it follows, that there is not in the books any precedent (favorable to our adversaries) relevant to the question now up, which is this: Does there inhere in an expressed grant of authority to use the militia to suppress insurrection

an implied power to use the militia in suspension or impairment of vested individual and public rights when no insurrection, in fact, exists? Given more specific application: May a Governor thus justify subordinates in suspending and impairing such rights? The answer to this question (along with the complete answer to most military usurpation) is to be found at any one of several places in Ex Parte Milligan and, particularly, in this language:

> "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

And doubly-assured answer is to be found in the unbending requirement of the Fourteenth Amendment (and in comparable terms in the Texas constitution) that power, actually vested, shall not be used capriciously and arbitrarily.

But the affirmative grant does not stand alone and unaffected (if it be given the wide range asserted by our opponents) by terms of superior force. All possibility of the words of the affirmative grant carrying along with them an implied power such as is claimed is cut off beyond resurrection or redemption by terms and prohibitions used by true sovereignty in carving exceptions "from the general powers of government."

In Section 24 of the Bill of Rights (Art. I, Const. of Texas) it is plainly said that "the military shall at all times be subordinate to the civil authority," and, as remarked, the power to make the "civil authority" subordinate to "the military" is, by force of this Section and Section 29, "excepted" from the "general powers of government." The prohibition is plainly expressed, in it there is no slightest ambiguity, no variableness, no shadow of turning. It is not that this subordination shall be incomplete or exist only at permitted times; it is that "the military" shall be "subordinate to the civil authority" at "all times." And since the provision was made, since its meaning is clear, since it is excepted from the "general powers of government," what officer of the government, it may be inquired, has warrant to supersede its imperative demand? What appears to us to be the unmistakable effect of Sec. 24 of the Bill of Rights in relation to Sec. 7 of Art. IV is that use of the militia "to suppress insurrection," in order to be lawful, must be in subordination to the "civil authority." The books do not contain a Texas case intimating a different interpretation; and every reported Texas case, in anywise bearing upon the matter, supports the proposition just made. The opposing argument, applicable anywhere, pays no respect to logic and, as applicable in Texas, completely ignores constitutional barriers not existent in those States whence it proceeds. That argument is this:

The Governor is a "civil authority;" he commands the militia; hence, use of the militia (whatever the use may be) is use of it by or in subordination to "civil authority." But "martial law," obviously, and essentially, is military force, a force which operates the "will of the commander" and sets at naught opposing rights and privileges secured in the common law and in statutes and constitutions and, even, as finally established by judgment of Courts of ample jurisdiction. The silly deceit which characterizes an argument that such a force is, at last, but exertion of "civil authority" is given emphasis by Counsel's admission (for purposes of the argument) that Appellees here have "the constitutional right to produce oil (without physical waste) to the capacity limits of their wells" and their view, immediately re-urged, that during the period of Martial Law the right is suspended.

If that which is plain may yet be clarified, the admission and contention to which reference has just been made demonstrates that which in reality, needs no demonstration, i. e., "Martial Law" does not and cannot exist save in and by way of suspension of municipal law. This, in turn, leads to further and indubitable proof that Martial Law (at least in virtue alone of executive action) cannot rightfully exist in Texas. And this will develop another phase in which our constitution differs widely from the con-

stitutions of those States whose jurisprudence has been called to the aid of Appellants here. The power (or specific denial of power) to which we now refer is that which is the subject of Section 28 of the Bill of Rights (i. e., Art. 1, Const. of Texas) whose language is:

> "No power of suspending laws in this State shall be exercised, except by the legislature."

And by Section 29 (Art. I) the authority of any officer or body (except the Legislature) to suspend laws is "excepted out of the powers of government." Here is a plainly and specifically expressed inhibitian of suspension of laws by any officer or body save the Legislature. How, then, may the Governor and his subordinates lawfully work that "suspension of laws" which is indispensible to existence of Martial Rule? As a matter of course, that cannot be done if the terms of Sections 28 and 29 of the Bill of Rights be given their obvious meaning. And there is naught in other provisions of the Constitution to imply (much less, to express) a different meaning for the words of Section 28 and 29. The effect of other relevant provisions, it seems plain, is corroborative rather than contradictory or restrictive of the literalism of Section 28 of Article I.

By terms of Section 1, of Article III, e. g., "the legislative power" is vested "in a senate and house of representatives" and in terms of Article II there is

expressed prohibition of use of such power by any other "person or collection of persons" except "in the instances * * * EXPRESSLY permitted." The effect of Section 1 of Article III and of Article II, manifestly, is that of a specific denial of legislative authority in executive or judicial officials except and unless such power (in particular instances) be given in EXPRESSED terms. This is tantamount to declared refutation of any and all claims by executive, etc., officers of right to use legislative authority where the claims are predicated in IMPLICATION. Inferences are without force in this respect, for the People (who are the State) have said that their servants (not of the "senate and house of representatives") who attempt to use legislative authority must be able to point to "expressed constitutional permission" in order to defend against a charge of flagrant usurpation. As stated already, there is not to be found in the constitution any expressed grant (to the Governor) of authority to declare Martial Rule or thereby to justify accomplishment of any of the things which are characteristic of Martial Rule. Words appropriate to expression of such a grant are not in Section 7 of Article IV, upon which Defendants rely; the authority there given is merely to use the militia "to suppress insurrection;" the terms used in making the grant are easily subject to the meaning that insurrection is to be suppressed by methods or means provided for by valid municipal

law and without interfering with rights secured by that law; hence, there is not in Section 7 of Article IV "expressed permission" for the Governor to exercise legislative authority. The declaration of Martial Rule is, in its essence, the exercise of legislative power; this is true, necessarily, because there is (in the period of Martial Rule) suspension of municipal law in whole or in substantial part. That truth has recognition in all of the cases, (as well as in treatises) having relation to the subject, e. g. Luther vs. Borden, 7 How. 1, 10-11, 34, 45, 12 L. Ed. 581, and Ex Parte Couplant, 26 Texas 387, 433, 435.

As plainly as *declaration* of Martial Rule is use of the legislative function, *sustenance* of Martial Rule includes exercise (by executives) of legislative power. For, obviously, expressions of the "will of the commander" declare whether or not rights and privileges bottomed in and vouchsafed by civil law may yet be enjoyed, and whether or not the remedies provided in municipal law may yet be pursued. Adjectively and substantively, the "will of the commander" replaces municipal law.

Hence, and because declaration and/or sustenance of Martial Rule is exercise by the Governor and/or his subordinantes of legislative power and because such authority is not "expressly permitted," it results that Martial Rule (on executive authority) is forbidden by conjoint effect of Article II and Section

1 of Article III of the constitution of Texas. Otherwise stated, Section 1 of Article III, taken with Article II, express (or obviously imply) the meaning emphatically declared in Section 28 of Article I, i. e., "No power of suspending laws in this State shall be exercised, except by the Legislature." A remark (in Ex Parte Milligan) concerning the martial-minded and touching authority of the Chief Executive is worthy of constant iteration: "They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws," and the views of the Judiciary Committee of the Confederate Congress (approved by Chief Justice Wheeler and Justice Bell and not in anywise disputed by Justice Moore in Ex Parte Coupland, 26 Texas 387, 406-8, 430-436) have appropriate relation here:

> "In whatever sense martial law may be declared, the power to declare or authorize it seems to belong exclusively to the legislature, whether of a state or of the Confederate States; if martial law over the people be necessary in any case, it should be regulated and defined in a sense consistent with the constitution *by distinct enactments.*"

There are in the text of the constitution yet other terms whose existence and meaning preclude legality in executively ordained Martial Rule.

"The judicial power of this State" is by Article V of the constitution vested in named courts. The Governor and/or his subordinates and military men do not appear in the list of those in whom is vested "judicial power." Nor is there in the constitution any relevant term "expressly permitting" the Governor and/or his subordinates to use "judicial power." In necessary consequence, such use of "judicial power" is forbidden in expressed terms of Article II. Yet if Martial Rule be lawful, its satellites may erect themselves into courts, displacing regularly constituted authority, and try out questions of property, liberty and even of life and death. The record here affords examples of actual use of that authority; and the basis of the justification offered supports its use in its maximum sweep. "Congress could grant no such authority," it was said in Ex Parte Milligan; all of the reasons which required that declaration as to the power of Congress exist to support a like statement as to lack of authority to delegate judicial power to any Texas non-judicial officer, and, in addition, there is in the expressed terms of Article II definite prohibition of use of such power by executive officers.

Necessarily, too, assumption of judicial power by Executives works suspension of laws providing for courts and judicial remedies and, thus, violates those provisions of the constitution of Texas: (*a*) Whereby "the legislative power of this State" is vested in

the Senate and House (Sec. 1, Art. III); (*b*) whereby an executive is prohibited the use of authority "properly attached" to the Legislature; (*c*) wherein there is expressed prohibition of "power of suspending laws * * * except by the legislature" (Sec. 28, Art. I).

In the constitutions of Texas prior to the instant one it was provided that laws should not be suspended except by the Legislature *or under its authority.* In 1870 the Legislature enacted a staute which, amongst other things, authorized (in terms) the Governor to establish "martial law" and, thus, to suspend municipal law. As pointed out in some detail on pages_____herein below, enactment of that statute and doings had under it provoked such tumult and such manifestations of outraged feeling as to cause repeal of the statute and such amending of the constitution as to omit the words authorizing suspension of laws under authority of the Legislature. So much is authoritatively stated by the Court of Criminal Appeals (the highest court of the State in criminal matters) in Arroyo vs. State, 69 S. W. 504.

And the unqualified terms of the constitution respecting Habeas Corpus are tantamount to expressed declaration against lawful Martial Rule.

In Section 12 of Article I (Const. of Texas) it is said: "The writ of Habeas corpus is a writ of

right, and shall never be suspended. The legislature shall enact laws to render the remedy speedy and effectual." Power to issue "writs of habeas corpus" is vested in the Supreme Court and justices thereof (Sec. 3, Art. V), in the Court of Criminal Appeals and justices thereof (Sec. 5, Id.), in the District Courts and judges thereof (Sec. 8, Id.) and in the County Courts and judges (Sec. 16, Id.) The writ thus provided for is *habeas corpus ad subjiciendum*, and its effect is to put the applicant under the authority and direction of the court issuing it and (during its pendency) to take the applicant from control of his captor, even though the captor be a military officer in command of troops during actual state of war. State vs. Sparks, 27 Texas 705, 707-709. And see, Ex Parte Bollman, 4 Cranch 74; Ex-Parte Milligan, 4 Wall. 2. We repeat what has been said in another connection: That Martial Rule and unsuspended writs of Habeas Corpus do not co-exist is manifest. Ex Parte Field, 5 Blachf. 63. The necessity of halting *habeas corpus* process in order that Martial Rule may be efficacious is the theme of (or has recognition in) most of the cases to which Appellants refer; and yet they are confronted with a term of Fundamental Law emphatically and unequivocally to the point that the *"writ of habeas corpus * * * shall never be suspended!"* Even in those jurisdictions whose constitutions allow the writ of habeas corpus (or its privileges) to be suspended on

happening of named contingencies "it has been the settled law" (as stated by the Supreme Court of Montana in Ex Parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B 988, 933) "ever since 1807 that suspension of the writ of habeas corpus is a legislative, and not an executive, function" (Ex Parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex Parte Merryman, Taney, 246, Fed. Cos. No. 9487; Ex Parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Johnson vs. Duncan 3 Mart., La., 530, 6 Am. Dec. 675; Ex Parte Benedict, Fed. Cas. No. 1292; McCall vs. McDowell, 1 Abb., U. S., 212, Fed. Cos. No. 8673; Re Kemp, 16 Wis. 360; Ex Parte Moore, 64 N. C. 807);" hence, and as declared by the Montana Court, "if the power to suspend that writ must stand or fall with the power to establish absolute martial law" (i. e., the power claimed by Appellants here), "the inference is inevitable that no such *regime* can be established by the executive." In a jurisdiction (such as Texas) whose fundamental law does not include provision allowing the writ to be suspended on occasion, but whose constitution, on the contrary, in plain words expressly declares that the writ "*shall never be suspended,*" there is patent inhibition of Martial Rule or any other rule (by executive authority or otherwise) whose sustenance, in whole or part, depends on inefficacy of Habeas Corpus.

So far, we have viewed the relevant text and struc-

ture of our constitution upon the words alone and their obvious literal meaning. In that view, we summarize:

(*a*). There is naught in the constitution upon which to base claim of existence of a "supreme executive authority," or such authority as has been used.

(*b*). Certain things are, by will of true Sovereignty, set beyond the power of *all* officers in confederation, to-wit: Subordination, at any time, of civil to military authority; suspension, at any time, of *habeas corpus*, declared, at all times, to be *a writ of* right. Such is the plainly expressed meaning of Sections 12, 24 and 29 of the Bill of Rights (Art. I, Const. of Texas).

(*c*). Certain powers, to-wit: Authority to suspend laws, in-so-far-as delegated at all, are by will of true Sovereignty, specifically vested in the Legislature (Sec. 28, Art. I and Sec. I, Art. III, Const. of Texas). That particular vesting, of itself, implies negation of rightful use of the authority by any other officer or group. But the negative, which otherwise would be implied, is thrice affirmatively declared, once in Section 28 of Art. I, once in Sec. 29 of Art. I and, again, in Art. II.

(*d*). Certain power, to-wit: "The judicial power," in-so-far as delegated at all, is vested in named

courts by words and effect of Art. V (Const. of Texas); use of that power by any other officer or group is prohibited, *first*, by its mere placement in the courts and, *second*, by terms of Art. II.

(*e*). Confessedly, Martial Rule, of the kind and with the scope claimed by Appellants, is not (legally) possible if the constitutional terms refered to be given their obvious meaning. Yet *expressed* warrant for ascribing to them (at any time) a different meaning is not to be found in other terms of the consituation; claim of such a warrant is based on implication. Basis for the implication (necessary to Appellants' claim) is precluded: *First*, by lack of that ambiguity which is essential to need for interpretation or (what is the same thing) allowance of implication. There is naught to construe. Expression and implication do not co-exist; the former precludes the latter. When a thing is declared there is an end to speculation. *Expressum facit cessare tactum.* (Swift Co. vs. United States, 101 U. S. 691, 695; U. S. vs. Graham, 110 U. S. 219, 221; U. S. vs. Tanner, 147 U. S. 663; Fairbanks vs. U. S., 181, U. S. 283, 311; U. S. vs. Finnell, 185 U. S. 236; Houghton vs. Payne, 194 U. S. 88, 99-100; G. H. & S. A. Ry. Co. vs. State, 81 Texas 572, 602, 17 S. W. 67; Fire Ass'n. vs. Love, 101 Texas 376, 108 S. W. 810; Judkins vs. Robinson, 109 Texas 6, 160 S. W. 955). Sec. 7 of Art IV (Const. of Texas), upon which Appellants must rely

for the necessary "implication," merely authorizes the Governor "to call forth the militia to execute the laws of the state, to suppress insurrection," etc. Other provisions clearly say that the writ of *habeas corpus* shall never be suspended by the Governor or anybody else, that the Governor (or anybody, save the Legislature) shall never suspend municipal law, that the Governor (or anybody, save the Legislature) shall not use legislative power except in instances *expressly permitted* (no such permission being claimed here) and that the military power shall at all times be subordinate to the regularly constituted civil authorities. Hence, there is no ambiguity upon which to predicate a challenge of this proposition: The militia, when called forth as provided for in Sec. 7 of Art. IV, shall be so used as that thereby there shall not be suspension of municipal law or other exercise of legislative power, no suspension of *habeas corpus* and (generally) no exaltation of the military over the civil authority. *Second*, By the manifest fact that the "implication" demanded, if allowed, would destroy (in whole or substantial part) plainly expressed meaning or terms of Sections 12, 24, 28 and 29, Art. I, and Sec. 1 of Art. II. The case of In Re Moyer, 35 Col. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, see, also, 148 Fed. 870, 212 U. S. 78, upon which Appellants greatly reply is founded, in the main, upon the rule stated in 1 Story, Const. Sec. 434, to effect that an *expressed*

grant of authority carries with it authority to use the means necessary to exercise of the power expressly granted. But the rule has its limitations, stated and recognized as sound by Judge Story and by the Colorado Court: No authority can be implied where its use is in anyway "expressly or impliedly prohibited." The Colorado constitution did not have a provision expressly prohibiting suspension of laws and did have a provision allowing privileges of the writ of *habeas corpus* to be suspended when the public safety (account of insurrection, etc.) might require and did have a provision vesting in the Governor "the supreme executive power of the state." The effect of that decision (in Re Moyer) is that the Colorado law did not expressly or impliedly prohibit use of the powers assumed by the Governor and, hence, that he lawfully assumed those powers in performance of the duty *expressly* declared. Read with the state of the Colorado law in mind, the decision implies that the result would have been the exact reverse of what it was if the Colorado constitution had been like that of Texas; in any event there is in the decision naught of support for Appellants' claims because Texas has a constitution such as has been described and, in all relevant parts, materially different from that which bound the Colorado court. *Third*, by that term of Art. II which prohibits use (by an Executive) of legislative authority except when "*expressly permitted*" and by absence of such

"expressed permission."

As suggested we would do, we have considered relevant terms of the Texas Constitution upon their words and arrangement alone. So taken, the plainly *apparent* meaning negatives possibility of lawful "Martial Rule" or of any ,'Rule" whose institution and/or maintenance (by the Executive or by the Legislature or by all officers combined) so operates as to suspend the writ of habeas corpus or its privileges, or to make the military superior to civil authority. Such *apparent* meaning precludes, also inauguration and maintenance by Executive action of any "Rule" whose institution and/or effect suspends municipal law or statutory or constitutional rights or interferes with jurisdiction of the courts or otherwise debases civil authority. And that such *apparent* meaning is the effect *in right intendment* is demonstrable, we believe, if (contrary to what we maintain) there is aught in the constitution's words to justify construction or aught in those words and referable extrinsics to justify any doubt whatever. A like result, too, will come from examination of such relevant Texas decisions as are in the books, to no one of which (astounding thing!) have Appellants so far made reference. To some available extrinsic testimonials and (with them) to adjudged cases we will now advance.

History, that which was general and, in varying

degree, remote and that which was local and recent, offers powerful reason for shaping the government of Texas to the exact form delineated by the terms and foregoing interpretation of the instant constitution. Affirmative evidence to the point lacking, we would yet assume relevant history (popular and juridicial) exerted its natural influence upon those who were engaged in stating fundamental law for government of free men. We do not, however, resort to assumption; for the story of Texas speaks eloquently a conscious thought of erasing all pretext for claim of absolutism and setting never-yielding restraints on delegated power. History, that which is the common heritage of Americans and that which belongs more exclusively to Texans, bespeaks an emphatic literalism for our constitution and a stern rebuke for the broad implications in which Martial Rule seeks to discover its warrant.

If conditions which presently circumstance public office in Texas were relevant, it might be well contended that our public men either know or care nothing of history and its stern lessons. Fortunately, however, we are to look upon the constitution through the eyes of those who wrote it (Cox vs. Robinson, 105 Texas 426, 150 S. W. 1149), and those men both knew and appreciated the experiences of mankind and the significance of man's efforts for assured liberty. Erudition and observation confederated to make them know that power

and liberty are unceasingly at war and that contemporaneous existence in a common orbit means *pro tanto* mutual destruction. They understood vigilance to be the nature of the one and a lethargic unsuspicion a characteristic of the other. That usurpation feeds upon itself is a lesson whose import they knew. They did not envision a metamorphized humanity resultant of the enterprise which they were launching; they knew that the sacrifices which individual liberty must endure for the common good must be defined with some precision, else they would set in motion an agency of destruction. Hence, it came about, their work (measured by their words) evidences a limitation on official power more stringent than is to be found in any document of whose terms they had knowledge. We have just reason to say that those men (authors and voters) were far above the average of mankind in intelligence and experience; but if we were to attribute to them only that which was of common knowledge before modern hysteria and its concommitants began their enervation of intelligence, we would yet make them know relevant history. From the volume of that story innumerable striking instances might well be recalled here because they so plainly teach the necessity of keeping the military at all times subordinate to civil authority and the difficulty of assuring that state as against the preverse ambitions and efforts of unworthy men mistakenly clothed with power.

English history, of course, is the first (but by no means the only) source of that knowledge which ought to be imputed to the authors of our jural being. The Common Law, whose beginning is coincident with (if, indeed, not more ancient than) the most remote of historical data, reflects instinctive repugnance to arbitrary power. Of that system Mr. Cooley (Const. Lim., 7th Ed., p. 50) justly says:

> " * * * That it recognized the worth, and sought especially to protect the rights and privileges, of the individual man. Its maxims were those of a sturdy and independent race, accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs; and arbitrary power and uncontrolled authority were not recognized in its principles. * * * The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people."

In a broad sense, it is proper to say that the struggles of Englishmen for those assurances of freedom which are embodied in each of a long-line of (so-called) constitutional documents were not, primarily, struggles for new or extended liberties at all, but were struggles against usurpers to regain and solemnly re-declare that which had been theirs of right from the beginning. Of one of the documentary "bulwarks" (perhaps, the greatest of them) Sidney has declared:

> It "was not made to restrain the absolute authority" (i. e., of the king), "for no such thing was in being pretended (the folly of such visions seeming to have been reserved to complete the misfortunes and ignominy of our age), but it was to assert the native and original liberties of our nation by the confession of the king then being, that neither he nor his successors should in any way encroach upon them." (Sidney on Government, c. 3, Sec. 27).

Before the advent of William the Conqueror (1066), it may properly be said, lack of arbitrary power in the king had been thoroughly established and was generally observed. William undertook to overthrow the laws which he found prevailing and, in the undertaking, he measurably succeeded. The lands of the conquered were, in the main, distributed to his own followers. Recognizing the manifest fact that if arbitrary power could give it could also take away, the recipients of William's bounty petitioned for restoration of the ancient baronial laws of Edward the Confessor. This petition was renewed, from time to time, to William I and, also, to William Rufus(1087-1100), but on various pretexts they were denied. But when Henry I appeared (1100) to claim the throne a 'charter" was required of him (and granted) whereby "evil customs" should be abolished and whereby most of the "privileges" subsequently named in Magna Charta were assured in a more or less definite way. In the course of the next hundred years most of the copies of that instrument disap-

peared, as did remembered knowledge of its content. It resulted that when John (with a clouded title) claimed the crown in 1199, the Barons demanded and John promised the ancient privileges. John, of course, disregarded the promise, so that at Running Mede in 1215, he was by threatened force compelled to accede (for himself and successors) to Magna Carta with its catalogue of free-men's rights.

The 29th Chapter of Magna Carta denounced (as if in so many words) the illegality of "Martial Rule" (at least in times of peace) by provision that:

> "No freeman shall be taken, or imprisoned, or disseised from his freehold, or liberties, or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him or send against him, except by legal judgment of his peers or the laws of the land. We will sell or deny justice to none, nor put off right or justice."

The appetite for power, however, remained as strong in English kings as it appears to be in modern Governors; and those kings broke the faith so often as that Magna Carta was, under impulsion, confirmed no less than thirty-two times between 1215 and 1416, notable amongst the instances are confirmation by Henry III in 1225 and the Confirmato Chartarum by Edward I, under the great seal, November 5, 1297.

In course of time and by various regal exponents

of absolutism attempts at thwarting of due process of law, provided for in part and forecasted in part in Magna Carta, were made, sometimes successfully and at other times in vain, and with the general results, on notable occasions, of further and firmer safeguards of the ancient rights of the people.

The arms of Lancaster and Hereford confronted Edward's forty thousand men at Boroughbridge on the Trent in 1322. The King's men won; Hereford was slain in the battle; Lancaster was taken in arms at the head of his insurgent army, tried by court-martial, sentenced and executed. Formidable actual rebellion existed; in very course of its denouement yet ere its passing was certain, the 'supreme executive" will supplanted due course of law and the "supreme executive's" military engine took rightful place of the "king's courts" to try, condemn and execute a citizen for treason. In form at least, attainder followed. But eight years later, in response to complaint of Lancaster's brother, the king confessed to Lords and Commons that the execution was but murder. Parliament reversed the attainder and declared the law of England to be and to have been:

> "1. That in time of peace nc man ought to be adjudged to death for treason or any other offense without being arraigned and held to answer," (note the requirement of due process).
>
> "2. That regularly when the king's courts

are open *it is a time of peace in judgment of law,*" (note how closely this was followed in Ex Parte Milligan), and,

"3. That no man ought to be sentenced to death, by the record of the king, without his trial *per pares.*"

(Hale's Pleas to the Crown, p. 499, 500; Hume, Vol. I, p. 159; 1 Hallam's Const. Hist., 260.)

Amongst those things which attributed to Mary I (1553-1558) the just sobriquet 'Bloody Mary" was her proclamation (1558) "that whosoever had in his possession any heretical, treasonable, or seditious books, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a rebel, and without any further delay be executed by the martial law." (Tytler on Military Law, p. 50, Ch. 1, Sec. 1). The historians say that at least as many as three hundred "heretics" were murdered by forms of "martial law" and other usurped means in Mary's short and fearful reign.

The "Ship Money" disturbances and other troubles became virulent (to the martial-minded) in 1625. Sir Thomas Darnell and others "rebelled" at payment of ship-money exactions. Darnell was arrested on "special order" of the King (Charles I). Petition for *habeas corpus* having been made, the "special order" of the king (exertion of "supreme executive authority") was asserted to be a sufficient answer.

Amongst the results of the trial in Parliament was this: The Petition of Right (declaration of the rights of the people as against the king) was prepared and presented to Charles; the king's acknowledgment, then (1628) compelled, gave the document virtue of a constitution and made it, for all time, one of the bulwarks of English liberties. *Inter alia*, The Petition of Right declared unlawful (and to have been unlawful) any violation of the following named terms: First, no freeman should be imprisoned, disseised of his land, etc., etc., but by the judgment of his peers or the law of the land; *second*, that no subject should be imprisoned without cause shown, precluding mere suspicion as reason for detention; *third*, that commissions for trial of offenders by martial law ought not to issue in time of peace, there being "peace in judgment of law" (as declared in Lancaster's Case) when the "king's courts are open."

Persistence and perversity of desire for authority which seems to be inevitable result of taste of absolutism manifested itself in Charles' bad-faith efforts to resume that which he had but shortly acknowledged as being the heritage of the people. He undertook to govern without convening Parliament, raising funds by levying poundage, ship-money, etc., and compelling payment by exertion of "supreme executive authority." The breaking out of civil war

and war with the Scots compelled him, at last, to convene Parliament (1640), the session earning the title "Long Parliament" and leaving fruits sweet to the taste of those who regarded liberty under law as being of first importance. Amongst the consequences of immediate relevancy are those next mentioned.

Charles had made Thomas Wentworth, Earl of Strafford, Lord Lieutenant of Ireland, etc. Strafford caused Viscount Stormont to be tried for treason by a military commission and, upon sentence of that body, to be executed. The Long Parliament impeached Strafford for treason and as for murder of Stormont. Vain was the defense that insurrection was rife, that Stormont was a traitor and that the army would be impotent if it were compelled to seek protection by the civil courts; equally vain were kingly influence and exertions in Strafford's behalf. He was convicted of murder and treason and executed.

Laud (Archbishop of Canterbury) another of Charles' official creatures, was impeached, convicted and executed for violations (by regal sanction) of the rights of the people.

In 1641 the House of Commons passed the Grand Remonstrance setting forth in more than two hundred clauses (each voted separately) usurpations, civil and military, by the king and demanding that each illegal exaction and act be presented and (if

proved) punished at the sessions and assizes and that justices and judges should be sworn to the due execution of the Petition of Right. Taswell-Langmead, Eng. Const. Hist., 464. The document was ordered published Dec. 14, 1641. Charles replied by "impeaching" and attempting to arrest (Jan. 4, 1642) five of the Parliamentary leaders. Failing in the attempt, Charles left London. At Nottingham, Aug. 22, 1642, he raised the royal standard; at Naseby, June 16, 1645, he was defeated by Parliamentary forces under Fairfax; May 5, 1646, he delivered himself to the Scottish army at Newark; surrendered to Parliament January 30, 1647, he was tried for treason January 20-27, 1649, and, thereupon beheaded.

In the time of James II (1685-1688) rebellion fomented with (apparent) abetment of the Seven Bishops. The Prince of Orange, across the Channel, prepared to invade the Kingdom, knowing that thousands of the king's subjects so desired and would give aid upon his approach. Within a few months the rebellion did, in fact, exile James and make him an outcast. While the conspiracy was flagrant but before its overt pronouncement James claimed the right to suspend the penal laws and upon the assumption arrested the bishops, thereby expressing regal fiat that public safety (account of imminent insurrection) required the means. Here was, then, plain assumption of "supreme executive au-

thority" to find or determine the "fact" of insurrection and, thereupon, to inaugurate a sort of "Martial Rule." Yet even James, so circumstanced, did not dare hold the bishops in military duress or to have them disposed of by court-martial; they were sent to the civil courts and to a jury whose verdict of acquittal was communicated to James while on Hounslow Heath reviewing the troops which he had prepared to meet the rebellion. See 12 How. St. Trials, 183.

William (Prince of Orange) and Mary, in 1688 commenced to occupy the throne lately in possession of the expelled Stuarts (James II, et als). Violence existed and was omended everywhere and to such extent as (upon the appearances at least) to render the king's person unsafe and to threaten the kingdom itself. Within the year, it will be remembered, decisive battle had ended the reign of James II; within the next two years, it will be recalled, James II, from his asylum in France, made descents upon the kingdom, particularly Ireland. Manifestly—existence of peace, save "in judgment of law" as declared in the reversal of Lancaster's attainder (1330), was doubtful. In any view of conditions, a reasonable mind could then have made an honest "finding" of insurrection actual or threatened upon which to predicate "Martial Rule" of at least a modified scope. Yet the new king, though flush with vic-

tory, recognized the unlawful quality of Martial Rule. He went to Parliament with statement of the violent conditions, with declaration that he had no power to declare martial law or to suspend the writ of *habeas corpus* or to seize and imprison persons on suspicion of treason or intended outbreaks against the peace of the realm and with prayer for advice and assistance. The response of Parliament was by passage of the Bill of Rights (1 Wm. & Mary, Sess. 2, c. 2, 1689). William and Mary were required, as condition of their election to the throne, to accept and agree to terms of this statute, and it was only after their acceptance and agreement that their accession was proclaimed (Feb. 13, 1689). See, 2 Gneist, Hist. of Eng. Const., 316, note; 1 Bouvier, Law Dictionary, Rawle's 3rd Rev., p. 362. This document (which, with the Petition of Right, served as general pattern for American Bills of Right) declared the *illegality*: Of royal pretension (past and future) of authority to suspend laws (including the Habeas Corpus Act) or their execution "without consent of Parliament;" of raising or keeping a standing army in time of peace, without consent of Parliament, etc., etc.

Lieutenant Frye was in naval service on a British man-of-war in 1743. By his superior he was ordered to assist in arresting another officer. Frye, as condition of obedience, demanded a written order per service custom. For this he was arrested, tried by

court-martial and sentenced to be imprisoned for fifteen years. In 1746 he sued the president of the court-martial for damages and recovered. He then sued Rear Admiral Mayne and Captain Rentone, members of the court-martial that had tried him, and they were arrested (on writ from the Common Pleas) just as a court-martial (of which they were members) adjourned for the day. Thereupon other members (15) of the court-martial re-assembled and declared (by resolution) that the order for arrest of Mayne and Rentone for their official acts was an insult to the dignity of the naval service. Chief Justice Willes immediately ordered arrest of all the members of the court-martial who had signed the resolution. Upon their arrest, those officers appealed to the king who, being military-minded, evidenced indignation at the arrests. The court, however, stood firm and investigation of the case proceeded. The final results were: (*a*) Ending of the proceeding upon presentation to the court of "an humble and submissive letter of apology" withdrawing the resolution) and, (*b*), recording of the letter in the Remembrance Office "to the end," as the Chief-Justice said, "that the present and future ages may know that whosoever set themselves in opposition to the law, or think themselves above the law, will in the end find themselves mistaken." McArthur on Courts-Martial, Vol. 1, pp. 268-271; 4 Wall. 45.

Joseph Wall was governor of the British colony at Goree in Africa in 1782, and, as such, was in command of a body of troops. He believed that a mutiny was about to break; he assembled the troops, held a consultation with his officers and, thereupon, ordered one Armstrong (suspected leader of the expected mutiny) to be seized and given eight hundred lashes with a rope. Armstrong died from injuries from the lashing. Two decades later Wall faced a charge of the murder of Armstrong and made defense that he had had power of life and death in case of mutiny, that necessity of the case justified him in suspending ordinary forms of law and that, as governor and commander-in-chief at Goree, he was sole judge of the necessities. Wall was convicted and executed. 28 State Trials, Howell's Ed., p. 51; Hough's Military Law, pp. 537-540.

In the wars between England and France various operations took place along the coasts of Nova Scotia, e. g., Louisburg was taken by New England troops in 1745; recovered by the French in 1748; and besieged and taken by the English (through Admiral Boscawen et als.) in 1758. Captain Gambier of the British navy, acting under orders of Admiral Boscawen, pulled down the houses of some sutlers who were supplying liquor to seamen with consequent injury to their health. Gambier was held liable in damages for the act. See Mostyn vs. Fabrigas, 1

Cowp., 180. In Mitchell vs. Harmony, 13 Howard 115, 135, 14 L. Ed. 75, the Supreme Court of the United States made these references to the transactions and litigation and its results:

> "The motive was evidently a laudable one, and the act was done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed . . . This case shows how carefully the rights of private property are guarded by the laws in England * * *."

Nor did the American colonies escape the furies of military usurpations by minions of the British king.

In February, 1775, Parliament declared the American Colonies to be in a state of rebellion. June 12, 1775, two months after Concord and Lexington and five days before Bunker Hill, with the colonial army besieging the city and its British garrison, General Gage declared martial law in Boston. (Annual Register for 1775, pp. 133, 247, 261; 7 How. 64-65.) November 7, 1774, with war flagrant throughout the colonies, Lord Dunmore, Governor, declared martial law in Virginia. The Virginia Assembly denounced the Act and Dunmore for having assumed, as it claimed, a power which the king him-

self dared not exercise, since it "annuls the law of the land and introduces the most excrable of all systems. (Annual Register for 1775. p. 28: 4 Am. Archives 87; How. 65). Justice Woodbury (in his dissenting opinion in Luther vs. Borden, 7 How. 66) declared, with warrant of history, that these acts of General Gage and Lord Dunmore had no support in English law.

Our national life was begun with a protest against military usurpation. The attempts at martial rule made by Gage provoked such universal indigation as to produce in the Declaration of Independence a charge that the King had "affected to render the military independent of and superior to the civil power." And throughout the Revolutionary War, even in its most desperate stages, our fathers were scrupulously careful to subordinate the miliary to the civil authority. General Washington's file of orders show that in four instances were civilians tried by military courts, *and each of those trials was expressly directed by Congress.* So, the only effort at anything like martial law made during the Revolution was pursuant to resolution by Congress. The common thought and feeling of necessity that the civil authority must always be superior to the military found expression to that effect in various constitutions adopted in the period of the war, e. g., those of Delaware, Maryland, North Carolina and

Pennsylvania, adopted in 1776, of South Carolina adopted in 1778 and that of Massachusetts adopted in 1780.

That sentiment had occasion for exhibition soon after independence had been achieved. Shay's rebellion occurred in Massachusetts in 1787, before adoption of the Federal Constitution. And while the militia was used in its suppression, this was not done until after the civil courts "were obstructed and put in jeopardy" and, even then, the militia acted in execution of warrants and not military orders. (Minot's History of Shay's Insurrection, pp. 95, 101; 7 How. 77). In four counties in Pennsylvania in 1793 there was rebellion (against the United States), violent resistance of the courts and treason. A series of cases arising out of that situation are reported at pages 335-356 of 2 Dallas. Judge Peters (officiating in the courts of the United States in that territory) certified that he had issued warrants which the marshal was unable to execute without military aid, and the marshal stated that he needed such aid. (1 Am. St. Papers, 185-186; Findley's Hist., App. 181, 316, 317; 7 How. 78). It has been estimated that 6,000 men were under arms ready to oppose the United States.

Yet when troops were called they were put under orders to put themselves under direction of the marshal. Washington accompanied the troops for the

avowed purpose of seeing to it that they "should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them." Washington said that he had issued orders "for the subordination of the army to the laws." (Findley's History of the Western Insurrection, pp. 144, 179, 181, 187; 7 How. 79).

The Revolution, produced by exertions of arbitrary power particularly characterized by military usurpations, was accomplished, as stated and in the main, without debasement of civil authority and with all proper regard for legal rights. And, as stated, the first occasions (Shay's Insurrection in Massachusetts and Whiskey Rebellion in Pennsylvania) for use of the military after Independence was achieved witnessed careful subordination of that power to the civil authority. Yet within the space of but few years the lust for power or the reckless use of military authority exhibited their tendencies, and this exhibition for necessity of unyielding restraints characterized every national or international disturbance thereafter.

Early in 1799 there had come about (as decided in the Eliza, 4 Dallas 36) a state of "public war" as between the United States and France. Such hostilities as transpired, however, consisted largely of naval operations under the non-intercourse Acts of that year. Of the many known illegal seizures, etc.,

made by naval officers under presidential orders those dealt with in the cases of The Charming Betsy, 2 Cranch 63, 2 L. Ed. 208, and The Flying Fish, 2 Cranch 170, 2 L. Ed. 243, are typical.

"Burr's Rebellion," so-called, in its suppression manifests both the tendency to exalt the military power and a recognition that this ought not be. Troops were ordered out and persons supposed to be in the conspiracy were, under presidential orders, arrested by them. At least those who were not actually engaged in hostilities or in war-like array or in abetting those so engaged were held to be immune from such arrests. See Ex Parte Bollman and Ex Parte Swartout, 4 Cranch 74, 101, 126, 2 L. Ed. 554; 7 How. 80. General Wilkinson then, in the main, yielded obedience to the forms of the civil law, such delinquencies in that respect as occurred resulted in "a presentment against his conduct by the grand jury of New Orleans." Annual Register for 1807, pp. 84, 88; 7 How. 80-81.

General Jackson in 1814 at New Orleans suspended the functions of all civil authorities and made his will the rule of conduct for all citizens. This was done in supposed precaution against danger of outrages (such as had but shortly occurred at Badajos and St. Sebastian) by troops then marching to the attack of the city; moreover, it was done with commendation of officers of the city, judges and mem-

bers of the Legislature. The power assumed, too, was used sparingly and moderately on actual occasion. Yet, New Orleans having been saved from the British, General Jackson faced the civil court, was adjudged in contempt and paid the penalty (a fine of $1,000.00); the Supreme Court of Louisiana (in Johnson vs. Duncan, 3 Martin's La Rep., O. S. 520) declared that everything done during the siege in pursuance of martial rule, but in conflict with civil law, was void.

For its lessons and its chronological significance some French history may here have appropriate notice.

The basic purpose and measurable final result of the French Revolution (1789-1799) and yet later happenings traceable (for cause) to that conflict was to bring irresurrectible death to the monstrous tenet and pretension of the Divine Rights of kings and other epitomes and particles of arbitrary power and autocratic privilege.

Paradoxical aftermaths were a series of military despotisms thinly guised in forms of constitutional functionaries. The last of these (1799-1815) brought Napoleon to his summit, thence swiftly to Elba, thence back to power, thence again and finally to Elba. But the constitution or "charter" ordained shortly thereafter is of relevant importance in its

provision:

> "Art. The king is the supreme chief of the state! he commands the forces by sea and land; declares war; makes treaties of peace, alliance, and commerce; appoints to every office and agency of public administration; and makes rules and ordinances necessary for the execution of the laws, without the power ever of suspending them, or dispensing with their execution."
>
> "Art. The king alone sanctions and promulgates the laws."
>
> "Art. Therefore there cannot be erected commissions of extraordinary tribunals."

Louis XVIII, put on the throne by outside force upon retirement of Napoleon, ruled with some faithful regard for the "charter" provisions. But upon his death in 1824 Charles X came to the throne to prove, with his bad faith and reactionary policies, that "a Bourbon learns nothing and forgets nothing." He lasted six years. With Charles' exile (1830), came the "Citizen King" (Louis Phillipe) and a new constitution. In that document the Articles quoted above were reproduced with the words "under what name or denomination soever" added to the last. Dupin thus stated the reason for that amendment:

> "In order to prevent every possible abuse, we have added to the former text of the charter 'under what name or denomination soever', for specious names have never been wanting for

> bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts."

Two years later formidable insurection broke in France. The king instituted martial rule in Paris by his order of June 6, 1832, declaring the city "in a state of siege" (the continental formula of martial law) founded (as declared) "on the necessity of suppressing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th, on attacks upon public and private property, on assassination of national guards, troops of the line, municipal guards and officers in the public service, and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks." June 18, 1832 the second military commission of Paris (officiating under the martial rule) declared one Geoffoy "guilty of an attack, with intent to subvert the government and to excite civil war" and sentenced him to death. Upon Geoffroy's appeal the Court of Cassation annulled the sentence with a judgment of these words:

> "Whereas Geoffroy, brought before the second military commission of the first military division, is neither in the army nor impressed with a miltary character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction, and the provisions of articles 53 and 54 of the charter and those

of the laws above cited: On these grounds the court reverses and annuls the proceedings instituted against the appellant before the said commission, whatsoever has followed therefrom, and especially the judgment of condemnation of the 18th of June, instant; and in order that further proceedings be had according to law, remands him before one of the judges of instruction of the court of first instance of Paris," etc.

In Spain arbitrary power and a sort of democracy were intermittently embattled, and a phase of the struggle appeared in Mexico, in the twenty years preceding Moses Austin's appearance in Texas. By 1812 Spaniards had secured a constitution with some material restraints on monarchs; and by 1819 revolt in Mexico had become manifest in the doings of Hidalgo, Gutierres, Magee, Kempner, Aury, and Lafitte and had been crushed, but not killed.

And, of course, there had been myriad instances of military overriding of or interferences with civil authority. A tragic instance is that of the trial of Nolan's men and execution (1807) of Blackburn who threw "a four" in the dice gamble about which one of the nine should die. The survivors were tried by civil authority and their release was ordered. The commandant of the internal provinces in Mexico, however, interfered and the matter was referred to Spain; the answer was that one out of each five of the men should be executed. One having died in the

meantime, leaving nine survivors, it was possible to satisfy arbitrary caprice by the sacrifice of but one American. See Wortham, A History of Texas, Vol. I, p. 37.

Arredondo had become commandant of the eastern internal provinces (which included Texas). He was, to say the least, suspicious of Americans and gave orders to Martinez, Governor of Texas, that Americans were not to be allowed to enter Texas on any pretext whatever. So, when Moses Austin reached San Antonio in 1820 he was met promptly with Martinez's demand to quit Texas forthwith. Austin, it will be recalled, had been a Spanish subject in Louisiana and he sought to bring this to Martinez's consideration. But Arredondo's orders to the governor had been emphatic; and Martinez refused even to examine Austin's papers. Austin was sick and almost exhausted; yet he prepared to leave. Just then he met Baron de Bastrop (an old acquaintance) and disclosed his plans (of settling Texas) and his plight. Bastrop became much interested in the project and secured for Austin a stay of the order to leave until he was "better able to travel." Bastrop then espoused Austin's plans with such force that Governor Martinez and the Ayuntamiento of Texas recommended a petition to Arredondo and the provincial deputation at Monterey for permission for Austin to settle three hundred families in Texas.

Leaving Bastrop as his agent in the matter, Austin returned to Missouri. His petition was granted January 17, 1821. Moses Austin, desperately ill, arranged with his son Stephen to carry out the plan. Moses Austin died June 10, 1821. Ibid, pp. 49, 63, 64, 67. Mere accident of a former and a fortuitous renewal of a personal acquaintance, then, defeated the whim of military autocrats and servile civil functionary and preserved to mankind the genius and statesmanship of the Austins.

Stephen Austin forthwith began his efforts to carry out the project. As he approached San Antonio for the purpose of having himself officially recognized as his father's successor, he received news of the so-called "Independence" of Mexico. He proceeded to the city and on August 24, 1821, Governor Martinez signed the commission authorizing Austin to govern the colony which he would found. On that day, too, Spain, through its agent Juan O'Donoju, stipulated with Augustin de Iturbide for the independence of Mexico.

It became necessary for Austin to go to Mexico City to procure from the new government (through its congress) a confirmation of the grant made to his father. He reached Mexico City April 29, 1822. He found the "government" to consist of a regency (Iturbide, et als.) and a congress, with a struggle between the two impending.

Iturbide, plainly, was driving a personal dictatorship. Generals Bravo and Victoria and many other political leaders were imprisoned by Iturbide for opposing his designs. And on May 18, 1822, a short time after Austin's arrival, the soldiery and populace of the city proclaimed Iturbide emperor. Five months later "congress was turned out of doors by an armed force, acting under a decree of the emperor," the decree "dissolved congress and vested the legislative power * * * in a body to be known as the junto instituyente, the members of which were chosen by the emperor himself." Wortham, A History of Texas, Vol. 1, pp. 97, 104, 106-7, 108.

The "government" finally enacted a general colonization law (January 4, 1823) and Austin thereupon (February 18, 1823) secured decree granting his petition. Ibid., pp. 109, 110.

But men were speaking of Iturbide as an usurper and revolution was imminent. Austin decided to remain in Mexico City pending developments. Iturbide practically abdicated; and "congress" met March 29, 1823. On March 31 it abolished the "executive authority" which had existed under the emperor and vested "the supreme executive power" in a tribunal of three members. April 8th congress declared: Iturbide's coronation to have been an act of violence; that all things done by the "government under the emperor" were illegal and subject to revis-

ion or revocation, and that Iturbide should be banished from Mexican territory forever. But three days later congress revived the coloization law long enough to permit Austin's grant to be confirmed, thereupon the colonization law was permanently suspended. Ibid., pp. 111-114.

All relevant documents were transmitted to Garcia, Governor of Texas, on June 16, 1823, with instructions to put them into effect. Garcia appointed Baron de Bastrop as Commisisoner to organize the colony and to install Austin as legal head of it in all matters of government, and on August 9, Bastrop performed this duty. Austin thereby became authorized to administer justice in the district and to organize and to form regiment of national militia such as was required, to be the chief with the rank of Lieutenant-Colonel. Wortham, A History of Texas, pp. 134, 135.

The struggle between absolutism and republicanism was still proceding in Europe, and the so-called "Holy Aliance" (of the principal monarchies in Europe) were exerting every effort possible to restore unrestricted monarchy in France and in Spain, inclusive of Mexico, of which Texas was a part. Texas thus became a pawn of international intrigue, and but for an historical event then shortly to transpier, Texas, in all probability, would have remained subject to European control for decades. The gen-

eral situation caused the pronouncement of the Monroe Doctrine. This pronouncement and the observance of its requirements meant that Mexico, inclusive of Texas, would remain under control of Mexico or American influences, this because Spain at that time had been reduced to such state as that it could not expect to regain its lost possesisons in America.

The Mexican Congress called an election for a new "constituent congress" to represent the true will of the people and to draw up a new constitution. This congress met in November, 1823, and its membership was overwhelmingly "Republican." Upon his return trip to Texas, Austin stopped in Monterey in May, 1823, and while there, he prepared a condensation of the principles of the constitution of the United States and submitted it in the form of a "plan" to Arispe, a political leader. Arispe became chairman of the committee appointed by Congress to draw up the ACTA CONSTITUTIVA, i. e., the provisional constitution, and this instrument, when drawn (as well as the "Federal Constitution") contained much of the substance of the "plan" which Austin had prepared. The Acta Constitutiva became effective January 31, 1824, and on May 7, 1824, Congress enacted an organic statute whereby Texas and Cohuila were erected into the "State of Coahuila and Texas," it being provided that Texas should become a separate state as soon as it "pos-

sessed the necessary elements."

The Federal constitution, displacing the Acta Constitutiva, became effective October 4, 1824, and amongst its notable features were the following (1 Gammel's Laws of Texas, pp. 72-93):

> "The supreme power of the Federation as to *its exercise*, is divided into the Legislative, Executive and Judicial powers" (Art. 6).
>
> "The supreme Executive power is entrusted to a single individual, who shall be styled President of the United Mexican States" (Art. 74). Amongst the "attributes of the President" were the following: To make regulations, decrees, and orders for the better observance of the constitution and general laws; to execute the laws and decrees; to dispose of the army and navy and active militia for the internal security and external defence of the nation (Art. 110). Amongst the "restrictions of his powers" were declarations that he "cannot deprive anyone of his liberty, nor impose any punishment," it being provided, however, that "when the welfare and security of the union requires" he might arrest persons, but in such event, he was required to place such persons "within forty-eight hours, at the disposition of the competent tribunals" (Section II, Art. 110). The President, in the conduct of his office was also subjected to surveillance by the "council of the Government" hereinbelow mentioned.
>
> "The Legislative power of the nation is confided to a general Congress" (Art. 7). Amongst

the powers given Congress were these: "To preserve the Federal union of the States, and peace and public order in the interior of the Confederation" (Section II, Art. 39) and "to dictate all laws and decrees which may conduce to accomplish such purpose" (Section XXX, Art. 50).

"During the recess of Congress there shall be a Council of Government composed of half the Senate, one from each state" (Art. 113) amongst whose "attributes" were "to watch over over the observance of the constitution * * * and general laws," "to make such observations to the President as they may deem useful to the accomplishment of the constitution and laws of the Union" and to "give their consent for using the local militia" (Art. 116).

In general it was provided that "Congress alone has the power to interpret the constitution in doubtful cases" (Art. 165).

"The Government of each state be divided into three powers; viz,: The Legislative, Executive, and Judicial, and two or more of these can never be united in the same person or corporation" (Art. 157).

In 1827 the constitution of the State of Coahuila and Texas became effective (1 Gammel's Laws, pp. 423-453.) Amongst its provisions were the following:

"The supreme power of the State shall be divided *for its exercise* into Legislative, Executive, and Judicial and neither of these three powers, or any two of the same, shall ever be

united in one corporation or person, nor shall the Legislative be deposited in one individual alone." (Art. 29). "The officers of the Government clothed with any kind of authority are mere Agents or Delegates of the States." (Art. 27).

"The Executive power shall reside in a citizen, to be styled the Governor of the State." (Art. 31). Amongst the "attributes of the Governor" were the following: "To take care that the internal order and tranquility of the State be preserved, and its safety without—for both objects disposing of the militia of the State." (Art. 110). Upon the power of the Governor there was made the following restrictions: He was not "to deprive anyone of his liberty or impose punishment upon him, but when the well-being and safety of the State require the arrest of any person, he may effect it on condition of putting the person arrested, within forty-eight hours, at the disposal of a competent tribunal or judge." (Art. 110). Exercise of Executive power was made subject to notice, etc., by the "permanent duputation" and by "Executive Council" mentioned below.

"The exercise of the Legislative power shall reside in a Congress composed of deputies chosen by the people." (Art. 30). To the Congress was given the power to 'regulate the services of the militia.' (Art. 213).

Before closing an "ordinary session" Congress was required to select from its own body "a permanent deputation composed of three members" (Art. 88) and it was made the duty of the deputation "to watch over the observance of the * * * constitution and general laws * * *

to give notice to Congress of the violations it may have noticed (Art. 98).

General restrictions against any and all governmental power were provided as follows: "Every man who resides within the limits of the state, although but transiently, shall enjoy the imprescriptible rights of liberty, security, property and equality," these being declared to be the "universal rights of men" (Art. 11)! "the confiscation of property shall forever be prohibited, and even the seizure thereof can only be effected on proceeding in crimes involving a pecuniary responsibility, and only in proportion thereto" (Art. 189)! "no authority of the State can issue a mandate for searching the houses, papers, and other effects of the inhabitants thereof, except in those cases, and in the form, the laws provide" (Art. 191).

The Mexican constitution, it will be observed, left but a restricted field for unbridled power. Mere words, however solemnly pronounced, are non-lethal and their darts fall blunted against the brassy shields of Power's lusts. The truth of this has exemplification in happenings immediately and remotely subsequent.

The year 1828 brought an election in Mexico at which Don Manual Gomez Pedraza received a majority of the votes of the state legislatures; and he was declared elected. Scarcely had the result of the election been announcd when one Antonio Lopez de Santa Anna pronounced the election illegal, denounced Pedraza as a secret enemy of his country,

and with a force of troops under his command stormed and captured the fortress at Perote. Santa Anna proposed, with the aid of the army, to compel the legislatures which voted for Pedraza to rescind their action and to have Guerrero declared president. He also demanded the passage of a law banishing all Spaniards from the country. Congress immediately declared Santa Anna to be an outlaw and dispatched a military force to effect his capture. Santa Anna, however, withdrew to Oaxaca and stayed in hiding for some weeks. November 30th a portion of Guerrero's forces seized a prison building in Mexico City, made it into a fortress, and therefrom obtained complete control of the City. Thus Pedraza was compelled to resign and renounce all claims to the presidency. And the same Congress which within a few months had declared Santa Anna an outlaw, procliamed his favorite, Guerrero, to be the duly elected president of the Republic. Thus the influence of the military in Mexican affairs and its power to elevate to the presidency a man who had been defeated by legal votes was established.

In July, 1829, Spain landed a force near Tampico under the command of General Isidro Barradas with proclamation calling upon the people of Mexico to rally to the support of their King. Barradas having taken the then deserted city of Tampico, great excitement prevailed and Congress (August 25) in-

vested President Guerrero with extraordinary powers. Ibid., pp. 328-329. Two days later, Anastasio Bustamante, Vice-President of Mexico, commenced a revolution with the avowed purpose of destroying Guerrero. Bastamante's actions were accompanied with denouncement of the dictatorial powers which had been conferred on Guerrero. Santa Anna, practically alone amongst the noted leaders, undertook to defend Guerrero; he urged Guerrero to remain in the capital and to resist the movement with force. Guerrero took the field in prson, but soon found that only a few of the troops were loyal. The result was that Bustamante assumed the office of president and proceeded to organize a cabinet on January 7, 1830, and a month later Congress "recognized accomplished facts" and declared Guerrero incompetent to be president. Santa Anna thereupon announced his recogntiion of Bustamante as President, and withdrew to his estate. Ibid., pp. 336-337.

One Teran (a friend and counselor of Bustamante's) became commandant of the Eastern internal states (including Texas) a military division which had been kept up in spite of the federalization of Mexico. Teran despised all Americans and all things American, besides, on numerous occasions, he exhibited fear thereof. Also, he was a Mexican who had been educated in Europe and had freely imbibed the doctrines of the Holy Alliance and its

tenets of absolutism. In consequence, trouble in Texas was to be expected.

Teran voiced his general policy in saying that "either the Government occupies Texas now, or it is lost forever, for there can be no possibility of reconquest when our base of operations would be three-hundred leagues distant, while our enemies" (meaning the United States of America, etc.) "would be carrying on the struggle close to their base and in possession of the sea." Ibid., p. 351.

What, specifically, Teran meant was that Texas should be strongly garrisoned with Mexican troops, and the policy was carried into effect by establishing several garrisons in Texas—the troops of which in large part consisted of Mexican convicts who were compelled to do military service during their terms and thereafter to become settlers in Texas. Ibid., pp. 361, 363.

The local administration of law was in practical effect put into the hands of Teran, and a substantial effect of this was the establishment of military government in Texas, so far as government of the colonists and the collection of import duties were concerned. To the immediate consequences of this action we will return in a moment.

We pause here to call attention to the fact that in

various parts of Mexico there was much discontent, manifested in acts of violence, about the conduct of Bustamante in ousting Guerrero. With aid of the military, however, Bustamante dealt with the situation in a way that was effective, at least temporarily. His formula was a simple one: Whoever started trouble was shot and whoever was suspected was jailed. Various governors of states were deposed merely because they held to adverse political faith. The jails were full of lesser political opponents. In many of the states civil officers had become mere puppets of the military. With the constitution supposedly in effect and with broad claim of its observance, Bustamante became the head and front of a despotism as complete as anything Iturbide had conceived. So effective (in appearances) were the means employed that Bustamante was enabled on January 1, 1832, to felicitate Congress on the progress of the "government" in his administration, remarking that "the fury and animosity of political parties" has almost disappeared. Wortham, A History of Texas, Vol. II, pp. 11, 12. Nevertheless——?

January 2, 1832, the "Plan of Vera Cruz" was announced by the garrison at that place. The "Plan" is thus sumarized:

> "1. The garrison renews the obligation to faithfully observe the federal constitution and laws.

2. It asks the vice-president to dismiss the ministers whom public opinion charges with upholding centralism and tolerating abuses against civil liberty and personal rights.

"3. It appoints a committee of two officers to lay these proceedings before Santa Anna, and invite him to repair to Vera Cruz and take command of the forces.

"4. The garrison, in the event of Santa Anna's acceptance of the invitation, abstains from addressing the supreme government. The general will send this act and such other remarks as he may deem expedient to the vice-president and the authorities of the federation and states, adopting such measures besides as may conduce to the accomplishment of the desired object."

Santa Anna "accepted;" the "government" responded with arms; Fernandez, governor of Tamaulipas, Gen. Moctezuma (at Tampico), Barragan (in San Luis Potosi) and others joined the movement against Bustamante and his "ministers" and the revolt became general. In form and declared faith it was revolt against militarism. Texas, of course, was affected by the usurpations to which reference has been made generally. There were, however, specific instances of flagrant violations of our people's rights,—of those instances and their immediate results some illustrations will be given.

The fact that Guerrero was given extraordinary powers on event of the Spanish invasion in 1829 has

been mentioned. Within a very short time that act and a consequence produced indignation in Texas. This occurred because Guerrero, pursuant to such authority, promulgated an edict abolishing slavery and without making any definite provision for compensation for the losses. Meetings were held, resolutions were passed, and Austin's declaration was that the edict was in plain violation of the Federal and State constitutions; but he counselled the peaceful means of appealing for recognition of the people's constitutional rights. Austin, however, proposed that if the edict were put into effect by publication, "the ayuntamientos must then take a unanimous, firm, and constitutional stand." Wortham, A History of Texas, Vol I, pp. 331-334. These means produced the desired result, Guerrero, on December 2, 1829, notified the Governor that the department of Texas had been exempted from the general decree. Ibid. 336.

Many land titles in Texas were as yet imperfect account of the delays of the Mexican Government in taking the necessary steps for their validation and recordation. Upon petition of various settlers Francisco Madero was named as land commissioner and one Carajal as surveyor. Madero arrived in Texas in January, 1831, with his surveyor, to carry out the Governor's instructions. He organized the Municipality of Liberty and began the survey of lands.

Colonel Bradburn, an American in the military service at Anahuac, notified Teran of this action. Teran declared the action was in violation of Mexican law and ordered Madero's arrest. Bradburn, as military commander at Anahuac, arrested Madero and his surveyor and imprisoned them. He also dissolved the Municipality of Liberty and undertook to chastise those who expressed unfavorable opinion of his acts, and in that connection arrested William Barrett Travis, Patrick C. Jack, Samuel T. Allen, Monroe Edwards, and other settlers. Bradburn proposed to try these men by military tribunals, and to send them out of Texas and to the interior of Mexico. This lead to formation of a company of "volunteers" whose purpose was the rescue of the prisoners. Like abuses had taken place in the vicinity of other Mexican garrisons, and the movement against the military became rather general. Results were that the fort at Nacogdoches was stormed and taken and the garrisons at Velasco, and other places were either captured or capitulated (with the promise of leaving Texas). Those of the colonists who had joined in the movement declared in favor of Santa Anna and his supposedly "republican" program. Wortham, A History of Texas, Vol. II, pp. 8-10, 25-46. The "Turtle Bayou Resolutions," adopted by unanimous vote of those besieging Anahuac, faithfully recited grievances. Those resolutions in part read as follows:

"Those colonists of Texas have long since been convinced of the arbitrary and unconstitutional measures of the administration of Bustamante, as evinced,

"1st. By their repeated violations of the constitution and laws, and total disregard of the civil and political rights of the people.

"2nd. By their fixing and establishing among us, in the time of peace, military posts, the officers of which, totally disregarding the civil authorities of the state, have committed various acts evincing opposition to the true interests of the people in the enjoyment of civil liberty.

"3rd. By arresting the commissioners, especially Juan Francisco Madero, who, on the part of the state government, was to put the inhabitants east of the river Trinity in possession of their lands, in conformity with the laws of colonization.

"4th. By the imposition of military force, preventing the alcalde of the jurisdiction of Liberty from the exercise of his constitutional functions.

"5th. By appointing to the revenue department men whose principles are avowedly inimical to the true interests of the people of Texas; and that, too, when their character for infamy has been repeatedly established.

"6th. By the military commandant at Anahuac advising and procuring servants to quit the service of their masters, and offering them protection; causing them to labor for his benefit and refusing to compensate for the same.

"7th. By the imprisonment of our citizens

without lawful cause; and claiming the right of trying said citizens by a military court for offenses of a chracter cognizable by the civil authority alone." (Ibid., 21-23.)

What those colonists thought ought be done in precaution against repetition of the matter of the "grievances" is manifest in the "resolutions" themselves:

"*Resolved*: That we view with feelings of the deepest regret the manner in which the government of the Republic of Mexico is administered by the present dynasty. The repeated violation of the constitution; the total disregard of the laws; the entire prostration of the civil power, are grievances of such a character as to arouse the feelings of every freeman, and impel him to resistance.

"*Resolved*: That we view with feelings of the deepest interest and solititude the firm and manly resistance which is made by those patriots under the highly talented and distinguished chieftain, Santa Anna, to the numerous encroachments and infractions which have been made by the present administration upon the laws and constitution of our beloved and adopted country.

"*Resolved*: That as freemen devoted to a correct interpretation and enforcement of the constitution and laws, according to their true spirit, we pledge our lives and fortunes in support of the same, and of those distinguished leaders who are now so gallantly fighting in defense of civil liberty.

> "*Resolved*: That all the people of Texas be invited to co-operate with us, in support of the principles incorporated in the foregoing resolutions." (Ibid., pp. 22-23.)

And that the "Turtle Bayou Resolutions" expressed, in general, the thoughts and feelings of nearly all the people of Texas is evidenced by conduct and expressions of various Ayuntamientos and leaders. In John Austin's address to Col. Mexia (on occasion of his appearance in Texas to "put down" the supposed revolution) it was said:

> "Since 1830 we have been pretty much governed militarily, and in so despotic a manner that we were finally driven to arms, to restrain within their limits the military subalterns of the general government. We have not insulted the flag of our adopted country, as has been falsely stated by our enemies, but on the contrary we have defended and sustained its true dignity, and attacked those who have outraged it by using it as a pretext for their encroachments upon the constitution and sovereignty of the state of Coahuila and Texas, and as a cover for their baseness and personal crimes." (Ibid., 34).

The Ayuntamiento at San Felipe passed an "act" declaring adherence to the "Plan of Vera Cruz" and reciting, inter alia:

> "A large standing army is totally unnecessary for national defense, in the present state of friendly relations between Mexico and all foreign powers except Spain, which latter, it is well known, is too impotent to attack her; . . .

such an army is a burden to the people and consumes the revenue of the nation without any benefit; . . . it endangers the national liberty and is continually disturbing the public tranquility by affording the means of committing and defending despotic acts and producing revolutions." (Ibid., 36-37.)

At Nacogdoches the Ayuntamiento declared for Santa Anna.

"In making this move, however, the members of the Nacogdoches body confined their complaints to the local manifestations of the military and unconstitutional policy of the government. They declared that they, 'as the constituted civil authority,' had been 'overawed by the military commander of the frontiers, Colonel Jose de las Piedras, until longer forbearance would become a crime, by exposing to his unconstitutional wishes the lives, interests and peace of our fellow citizen.' " Ibid., 39.

The "revolution" in Mexico was ended by "peace terms" executed by Santa Anna and Bustamante, December 23, 1832. Under those "terms:" Pedraza was installed as President to serve until April 1, 1833; an election for President and Vice-president and members of Congress called. Ibid., 71.

Santa Anna addressed President Pedraza on the subject of Texas, saying in part:

" 'I deem it my duty to call special attention of the President to the condition of Texas. Satisfied as I am that the foreigners who have introduced themselves in that province have a

> strong tendency to declare themselves independent of the republic, and that all their remonstrances and complaints are but disguised to that end, I think it to be of paramount importance that General Filisola should forthwith proceed to fulfill his mission, having been first well supplied with good officers and the greatest number of troops possible, with instructions both to secure the integrity of our territory and do justice to the colonists. * * * '" Ibid., 72.

"The General Filisola referred to was the new commandant of the eastern internal provinces, an Italian in the Mexican service. What his 'mission' was conceived to be may be judged by the fact that on March 2, 1833, the Mexican minister of relations wrote to Butler, the American representative at Mexico City, that the North American colonists in the department of Bexar were preparing to secede from the State of Coahuila and unite themselves to the United States. He said they were being encouraged in their plans by people in the neighboring North American states, and that he hoped that the United States Government would do what it could to stop this. The president of Mexico, he added, had issued such orders as were deemed necessary to prevent the move on the part of the Texans to detach Texas from the republic. These orders, of course, were issued to Filisola, and they concerned the reoccupation of Texas. The troops which had been banished in the name of Santa Anna were to be sent back at Santa Anna's advice. Such was the program

which the Mexican government proposed to apply in dealing with the Texas situation." 'bid., pp. 72-73.

At the election provided for in the "peace terms" (of Dec. 23, 1832) Santa Anna and Gomez Farias were elected, respectively, President and Vice-President and they took office April 1, 1833. Farias was truly "republican." The Congress, elected at the same time, was radically so. Santa Anna pretended republicanism, but aimed at despotism. How the thing worked out is thus described by Wortham ("A History of Texas." Vol. II, pp. 86-89, 106, 153-155):

> "Santa Anna was deep in intrigues to have himself made the leader and beneficiary of this movement, while still posing publicly as the champion of federalism and the constitution of 1824. Indeed, he had begun to plan to this end even before he was installed as president. The new congress that had been elected following Santa Anna's triumph over Bustamante had convened on March 21, just ten days before the expiration of Pedraza's short term, and had immediately started to consider a series of the most radical "reforms" amid at the privileges of the church and the power of the army. The election had been held amid a ferment of the most extreme radicalism, and the reactionaries, hopeless of obtaining any recognition in the congress, conspired in many instances to have elected candidates from the lowest and most ignorant class in the country. It was reasoned that this was the surest way to bring about reaction. The result was a congress made up of the most rabid anti-clerical and anti-military ele-

ments of the nation. Pedraza laid down the reins of office at the very moment that the conservative and privileged classes of the country had become alarmed over the demonstrations of radicalism in congress. Sensing this situation, Santa Anna purposely absented himself from the capital and Gomez Farias had become acting president from the moment of his inauguration as vice-president.

"It was Farias, therefore, who had to deal with the extremists in congress and, incidentally, to bear the onus of their "reforms." He sought to restrain them in their wilder flights into the realm of vindictive legislation, but he was powerless. When Santa Anna finally appeared in the capital on May 16 to assume the presidential authority, the first session of the congress was nearing its close, and already the centralist party issued a document denouncing that body and its acts. Ten days later Colonel Ignacio Escalada, in the state of Michoacan issued a pronunciamento pleading himself and his followers 'to defend at all hazards the religion of Christ and the rights and privileges of the church and the army.' The pronunciamento called upon Santa Anna to assume the role of protector of those rights and privileges. Santa Anna immediately turned the office of president over to Farias again, and left the capital with a force of troops, ostensibly to put down these rebels.

"Then there occurred a farcical episode which could hardly have taken place anywhere outside of Mexico, except, perhaps, in the pages of melodramatic fiction. On June 6, Santa Anna had himself made prisoner by his own troops and proclaimed dictator. Farias apparently was left

helpless in the capital and at the mercy of the small body of troops stationed there. But if Santa Anna expected this move to succeed, he failed to appreciate the character of the man who was in the vice-president's chair. The troops in the capital attacked Farias in the palace and the later was without force of any kind to defend the government. But within a few days he had organized six thousand civilians into a voluntary army to protect the capital and then proceeded to take steps to rescue the captured president. In the face of this turn of events, Santa Anna then 'escaped' from his captors and returned to the capital. Congress, which in the meantime had been reconvened, became furious over the attempt of the army to seize the government, and passed a most drastic measure, since known as the *ley del caso*, which authorized the president to order the arrest and exile for a period of six years of the most prominent persons belonging to the party of 'religion and privileges.' Beginning with Bustamanto, the list included the outstanding reactionary leaders, dignitaries of the church and the Spanish priests. Farias atempted to dissuade the radicals against passing this measure, but without avail. The result was that reaction began to gain ground, for every one of the prescribed individuals now become an open revolutionist.

"Santa Anna had reassumed the office of president on June 18, but on July 5 he again stepped down in order to undertake a campaign against Arista and Duran, two officers who were besieging Puebla. On July 10 he left the capital with a force of twenty-four hundred men, and on the same day there was published a letter from Arista and Duran, addressed to Santa Anna, advocating the abolition of the fed-

eral system of government. This letter, which purported to be in reply to a request from Santa Anna for the views of its authors with respect to the government, proposed that Santa Anna seize the government, declare himself dictator, and that a national convention be called to give the nation any form of government other than the federal. It declared that the federal system was unsuited to Mexico. This letter was the chief topic of political discussion when Austin arrived at the capital a week after its publication. At the every moment the representative of the colonists was preparing to present to the government their petition praying that Texas be erected into a separate state under the federal system, forces were being set under way with the object of abolishing the federal system altogether." Ibid., pp. 86-89. "Santa Anna finally had a decisive battle with the followers of Arista and Duran at Guanajuato, completely routing the rebels. The intriguing president was playing a double game, however, for while apparently crushing the party of 'religion and privileges,' his real purpose was to obtain leadership of the party himself, and with its support become absolute dictator of Mexico. But this did not appear on the surface for the time being, and the outlook for peace and for constitutional government seemed bright." Ibid, p. 106.

"Santa Anna, who had been scheming for more than a year to make himself leader of the movement of 'religion and privileges,' and through its agency to become dictator of the country, decided in April, 1834, that his hour had come. He had managed to keep himself clear from the futile attempt of the radical congress to reduce the church and the army from the privileged positions in the short space of

a year, and the responsibility for that radical program was placed upon Farias. Almost from the first day congress had met a year before, reaction had set in. Throughout the year it had been growing, and in spite of Santa Anna's victory over the forces of Arista and Duran in October, it had continued to gain ground in all parts of the republic. Santa Anna had turned the affairs of the government over to Farias on December 16, 1833, and had retired to his estate on a plea of ill health. Thus, during the first year of his term as president, he managed to be absent from the capital about three-fourths of the time, serving scarcely three months in the office. He was playing a deep game; and when the situation shaped itself to his liking his health suddenly improved; he returned to the capital, and Farias stepped down for the last time.

"The immediate events which gave Santa Anna his opportunity grew out of the proclaiming of a *plan* at Ecatzingo early in February, which proposed to set up a monarchy with a descendant of Montezuma on the throne. It was a crazy movement, and was without any serious support, but it caused alarm among the members of congress. Its authors were the curate Epigemio de las Piedras and a certain Father Carlos Tepixtoc, and it contemplated nothing short of a restoration of the old dynasty of Montezuma, which the Spanish conqueror Cortes had overthrown, three centuries before. It preached a war of races and invited the Indians to take up arms and demand an equality of rights. That the members of congress should take such a movement seriously is a significant comentary on their inteligence and rabid temper. They declared that the move-

ment was the work of the clergy and so they embarked upon a program of reprisal. New drastic legislation was pased, culminating in a decree of April 10, providing that no person who participated directly in the 'arrest and assassination of Guerrero' should be permitted to belong to the Mexican army. The storm of reaction then burst over the country, and on April 24 Santa Anna again appeared in Mexico City and took over the government.

"Mexican liberals blamed Farias for not placing Santa Anna under arrest as a conspirator against his country's institutions. But the vice-president's fear of being suspected of personal ambition, and of being accused of unconstitutional acts, led him to turn over the government peaceably to the president, in spite of the fact that he was morally certain that the later's intention was to destroy the federal system. Farias left the president's chair with his hands free of 'money and blood,' and the reactionary movement, with Santa Anna at its head, had a clear road ahead. On May 23 a *plan* declaring for 'religion and privileges and Santa Anna' was proclaimed by leading centralists at Cuernavaca in the State of Morelos, and from that point forward the "*plan* of Cuernavaca" was the rallying point. It called upon Santa Anna to dissolve congress and take charge of the government, and on May 31, Santa Anna responded in vigorous fashion. He not only dissolved congress, but he dissolved the state legislatures as well, dismissed the members of Farias's cabinet with the exception of a reactionary named Lombardo, deposed governors who refused to adhere to the *plan* of Cuernavaca and even went so far as to eject from office the members of municipal ayuntaminetos who

failed to do his bidding. With the clergy and the army supporting him, Santa Anna assumed absolute power. 'Behold him,' says Bancroft, 'ruling as dictator, without congress, council, legislatures or ministers.' The whole proceding was unconstitutional but both he and his supporters pretended that the constiution of 1824 was still in effect. Some of the states resisted, but resistance was ruthlessly put down." Ibid., pp. 153-155.

See, also, Brown's "History of Texas," Vol. 1, pp. 248-250, 275-279.

April 1, 1833, (the day Santa Anna became President of Mexico) the delegates elected by the Texas colonists met in the Convention of San Felipe de Austin. 1 Gammels Laws of Texas, pp. 475-503. Among results of that Convention was a request for separate statehood, draft of a proposed constitution and appointment of Stephen F. Austin, Miller and Seguin to present the request to Mexican authorities.

Authorship of the "constitution" has been attributed to Sam Houston (then comparatively new to Texas). Its provisions, in the main, followed the more or less standard texts of American constitutions, with some ultra-democratic additions. Amongst its terms was a Bill of Rights of twenty-seven articles, the first and second articles of which read, respectively, as follows:

"All power is inherent in the people, and all

free governments are formed upon their authority, and established for their peace, safety and happiness. For the advancement of those ends, they have the inviolable right to alter, reform and abolish the government in such a manner as they may think proper."

"Government being instituted for the protection and common interest of all persons, the slavish doctrine of non-resistance against arrogant power and oppression is discarded, as destructive to the happiness of mankind, and as insulting to the rights, and subversive of the wants of the people." Ibid, p. 79.

See: Wortham, 'A History of Texas," Vol. II, pp. 78-79; Brown's "History of Texas," Vol. I, pp. 227-238.

The Petitions, resolutions, etc., of the Convention, along with the draft of a constitution, were transmitted to Mexico City. Of the three appointed to go there to urge the matter only Austin was able to go. He reached Mexico City, July 18, 1833. Wortham, "A History of Texas," Vol. II pp. 82, 85, 89. Austin's arrival was in the midst of Santa Anna's intrigues (noted above); and it was not until Dec. 7, that he received the "government's" answer to the requests, etc., framed by the Convention of San Felipe, Ibid., 109. Some of the requests were granted; that of statehood was denied. Ibid., 108-110.

In presentation of the petitions of the Convention Austin had made some vigorous statements respect-

ing Texans and their sentiments and attitude. That "independence" of or other separation from Mexico was not the object (present or remote) was made plain. But it was also made plain, in words at least, that it was "useless to try to subject or regulate Texas by military force." Ibid., 89-93. Congress had met and failed to dispose of the matters presented by the Convention of San Felipe; Austin, almost in despair, bluntly informed Vice-President Farias (President Santa Anna being away on an expedition) that "if something were not done soon to meet the situation he feared the colonists would take things in their own hands and set up a State for themselves." Farias took this to be a threat and "flew into a rage." Austin was convinced that "it was futile to expect relief from the government." Subsequently he became more optimistic and, in fact did procure a measure of relief as has been shown. But in his then mood he resolved to suggest to the colonists that they proceed to organize a state government without awaiting consent of the federal authorities. Accordingly (October 2, 1833) he wrote to the Ayuntamiento at San Antonio advising it "to take the lead in launching a state organization" and saying:

> "In the letter that I addressed you on the 14th of August, last," wrote Austin, "I expressed the opinion that the affairs of Texas would turn out favorably. Since then there have been very

few sesisons of Congress on account of cholera. The events of the civil war also have delayed all public affairs in such a way that nothing has been accomplished, and I am sorry to say that in my opinion nothing will be done, and that it is difficult to form an idea of the result of the civil war.

"In this state of affairs I recommend that all the ayuntamientos of Texas put themselves into communication with each other without delay for the purpose of organizing a local government for Texas, in the form of a state of the Mexican federation founded upon the law of May 7, 1824, and have everything ready to accomplish this in union and harmony as soon as it is known that the general congress has refused its approbation.

"This step is absolutely necessary as a preparatory measure, because there is now no doubt that the fate of Texas depends upon itself and not upon this government; nor is there any doubt that, unless the inhabitants of Texas take all its affairs into their own hands, that country is lost.

"I am firmly persuaded that the measure that I recommend is the only one that can be adopted to save us from anarchy and total ruin. This being my conviction, I hope that you will not lose a single moment in addressing a communication to all the ayuntaminetos of Texas, urging them to co-operate in the plan of organizing a local government independent of Coahuila, even though the general government should deny its consent." Ibid., 104-106.

Austin's letter (with comments by the Ayunta-

miento and others) was forwarded to Mexico City and received by the "government" there just after Austin had (on Dec. 10, 1833) commenced his return to Texas. Ibid., 114. Orders for Austin's arrest "on sight" were immediately transmitted to all military commandants; and upon his arrival at Saltillo Austin was arrested by the military commandant and informed that he would be returned to Mexico City, Ibid., 114-115.

Returned by his captors to Mexico City (Feb. 13, 1834), and without being taken before a civil tribunal, Austin was imprisoned in a dungeon of the old Inquisitions and there held *incumunicado* until May 9. After May 9th until Dec. 25th (when bail was allowed) he was kept in prison without ever being informed of the precise charge against him, but he was allowed to communicate with his friends and to receive visitors. Ibid., 112, 135-136, 149. As stated, Austin was released on bail Dec. 25, 1834; but he was not permitted to leave Mexico City until July 13, 1835, when he was finally released without trial. Ibid., 152, 303.

Austin, having endured tortures of imprisonment as a result of voicing his own and his peoples' opposition to usurpation (principally military), was yet to encounter the mailed hand ere his return home. Coming to Vera Cruz on his return Austin was not allowed to embark until after he had sought out

Santa Anna and secured from him "special permission." Ibid., 303.

Santa Anna and a Congress under his influence, having (as shown) established a despotism in guise of a republican government, moved so rapidly as that by the time Austin arrived in Texas the Governor of Coahuila and Texas had been deposed and, in fact, the entire civil government of the State had been disorganized by military decrees and force. Texas history spanning the period intervening Austin's departure for Mexico City (in 1833) and his return (in 1835) is replete with instances of military invasions of the people's rights. War came within the year. It began as a war against military despotism under claim of law; it was fought out to (what was intended to be) perpetual death to military usurpation. This conscious thought of Texans was stated in varying form in declarations of the first convention of the people after the war had begun (Wortham, A History of Texas, Vol. II, pp. 414-415):

> "Whereas, General Antonio Lopez de Santa Anna, and other military chieftains, have, by force of arms, overthrown the federal institutions of Mexico, and dissolved the social compact which existed between Texas and the other members of the Mexican confederacy; now the good people of Texas availing themselves of their natural rights,
>
> SOLEMNLY DECLARE

"1st. That they have taken up arms in defense of their rights and liberties, which were threatened by encroachments of military despots, and in defense of the republican principles of the federal constitution of Mexico, of eighteen and twenty-four.

"2d. That Texas is no longer morally or civilly bound by the compact of union; yet, stimulated by the generosity and sympathy common to a free people, they offer their support and assistance to such of the members of the Mexican confederacy as will take up arms against military despotism.

"3d. That they do not acknowledge that the present authorities of the nominal Mexican republic have the right to govern within the limits of Texas.

"4th. That they will not cease to carry on war against the said authorities whilst their troops are within the limits of Texas.

"5th. That they hold it to be their right during the disorganization of the federal system and the reign of despotism, to withdraw from the union, to establish an independent government, or to adopt such measures as they may deem best calculated to protect their rights and liberties, but that they will continue faithful to the Mexican government as long as that nation is governed by the constitution and laws that were formed for the government of the political association."

That conscious thought has much evidence in the Declaration of Independence (1 Gammel's Laws of Texas, pp. 1063-1067:

"THE UNANIMOUS DECLARATION OF INDEPENDENCE MADE BY THE DELEGATES OF THE PEOPLE OF TEXAS IN GENERAL CONVENTION AT THE TOWN OF WASHINGTON ON THE 2D DAY OF MARCH, 1836.

"When the government has ceased to protect the lives, liberty and property of the people, from whom its powers are derived, and for the advancement of whose happiness it was instituted, and so far from being a guarantee for the enjoyment of those inestimable and inalienable rights, becomes an instrument in the hands of evil rulers for their oppression: When the Federal Republican Constitution of their country, which they have sworn to support, no longer has a substantial existence, and the whole nature of their government has been forcibly changed, without their consent, from a restricted federated republic, composed of sovereign states, to a consolidated, central, military despotism, in which every interest is disregarded but that of the army and the priesthood—both the eternal enemies of liberty, the ever-ready minions of power, and the usual instruments of tyrants: When, long after the spirit of the constitution has departed, moderation is, at length, so far lost by those in power that even the semblance of freedom is removed, and the forms, themselves, of the constitution discontinued; and so far from their petitions and remonstrances being regarded the agents who bear them are thrown into dungeons; and mercenary armies sent forth to force a new government upon them at the point of the bayonet: When in consequence of such acts of malfeasance and abdication, on the part of the govern-

ment, anarchy prevails, and civil society is dissolved into its original elements. * * *

"* * * the Mexican nation has acquiesced in the late changes made in the government by General Antonio Lopez de Santa Anna, who, having overturned the constitution of his country, now offers the cruel alternative either to abandon our homes, acquired by so many privations, or submit to the most intolerable of all tyranny, the combined despotism of the sword and the priesthood.

* * *

"It has suffered the military commandants stationed among us to exercise arbitrary acts of oppression and tyranny; thus trampling upon the most sacred rights of the citizen and rendering the military superior to the civil power.

"It has dissolved by force of arms the State Congress of Coahuila and Texas, and obliged our representatives to fly for their lives from the seat of government; thus depriving us of the fundamental political right of representation.

"It has demanded the surrender of a number of our citizens, and ordered military detachments to seize and carry them into the interior for trial; in contempt of the civil authorities and in defiance of the laws and the constitution.

* * *

"It hath been, during the whole time of our connection with it, the contemptible sport and

victim of successive military revolutions, and hath continually exhibited every characteristic of weak, corrupt and tyrannical government.

"These, and other grievances, were patiently borne by the people of Texas until they reached that point at which forbearance ceased to be a virtue. We then took up arms in defense of the national constitution. We appealed to our Mexican brethren for assistance. Our appeal has been in vain. Though months have elapsed, no sympathetic response has yet been heard from the Interior. We are, therefore, forced to the melancholy conclusion that the Mexican people have acquiesced in the destruction of their liberty, and the substitution of a military government—that they are unfit to be free and are incapable of self-government.

"The necessity of self-preservation, therefore, now decrees our eternal political separation. * * *"

The Constitution of The Republic of Texas (1 Gammel's Laws of Texas, pp. 1069-1085) adopted Sept. ....., 1836, manifests intent to safe-guard liberty against official usurpation—intent to avoid military usurpation in all the phases and, especially, those aspects which had anciently and recently brought terror and suffering to our people. By Section 1, Article I, separation of powers of government was declared. "The executive authority" was vested in a President (Sec. 1, Art. III); amongst his duties was placed that of seeing "that the laws be faithfully executed" (Sec. 7, Art. VI),—there was no

declaration of authority in him to use the militia for that purpose. Legislative power was vested in a Congress of two Houses(Sec. 2, Art. I), and amongst powers given Congress was that of calling out "the militia to execute the law, to suppress insurrections and to repel invasions" (Sec. 6, Art. II), And in the "Declaration of Rights" (excepted from powers of government and "reserved to the people") it was declared:

> "Seventh. No citizen shall be deprived of privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land.
>
> * * *
>
> "Tenth. * * * and the privilege of the writ of 'Habeas corpus' shall not be suspended, except in case of rebellion or invasion the public safety may require it.
>
> "Eleventh. Excessive bail shall not be required, not excessive fines imposed, or cruel or unusual punishment inflicted. All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.
>
> * * *
>
> "Thirteenth. No person's particular services shall be demanded, nor property taken or applied to public use, unless by the consent of himself or his representative, without just compensation being made therefor according to

law.

"Fourteenth. * * * The military shall at all times and in all cases be subordinate to the civil power. * * *"—Wortham, A History of Texas, Vol. III, 433-4.

The manifest purpose — the conscious revolt against the idea of military power—notwithstanding, the constitution then adopted included (as other constitutions have included) at least one possible defect whereon a military mind could erect a theory of rule partially (at least) beyond ordinary regimen. For by Section Tenth of the "Declaration of Rights" it was provided (at least, by implication) that the privilege of the write of *habeas corpus* might be suspended for public safety in case of rebellion or invasion. Comparable terms (or implications) were and are to be found in most of the American constitutions, including the first, second and third constitutions of the State of Texas—but for definite reasons, presently to be shown, all possibility of lawful suspension of the writ or its privileges (under any conditions) was destroyed by adoption (in 1876) of our present constitution.

Texas fought and won the war for independence and (with the constitution just described) lived free from internal usurpations but under threat of external militarism until American statehood came despite exertion of Mexican force. In conscious re-

pudiation of absolutism in all its phases—in conscious effort at death of military rule—came the rebirth of Texas as an American state, as had come its birth as an independent sovereign.

By terms of the State Constitution (adopted in 1845 and in force until in 1861 and thereafter—with some changes conformable to the constitution of the Confederate State—until Oct. 8, 1866):

a.—There was provided (in Art. I) a Bill of Rights of twenty-one sections defining rights of the people and expressly excepting those rights from scope of the powers of government delegated. Amongst provisions of the Bill of Rights were:

"Sec. 10. The privilege of the writ of habeas corpus shall not be suspended, except when in case of rebellion or invasion, the public safety may require it.

* * *

"Sec. 14. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contracts, shall be made; and no person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person.

* * *

"Sec. 16. No citizen of this state shall be deprived of life, liberty, property or privileges,

outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land.

"Sec. 17. The military shall at all times be subordinate to the civil authority.

"Sec. 20. No power of suspending laws in this state shall be exercised, except by the Legislature or its authority.

"Sec. 21. To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of Government, and shall forever remain inviolate; and all laws contrary thereto, or to the following Provisions, shall be void."—2 Gammel's Laws of Texas, pp. 1278-1279.

As will be shown, Secs. 10 and 20 were (for definite reasons) materially changed in 1876.

b.—Distribution of the delegated powers of government were made as between the three Departments (Art. II) with declaration that "no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein *expressly permitted.*" This provision has remained without change in all subsequent constitutions.

c.—A Governor was provided for in these words (Sec. 1, Art. V):

"The supreme executive power of this State shall be vested in a Chief Magistrate, who shall be styled the Governor of the State of Texas."—2 Gammel's Laws of Texas, pp. 1287-8.

The Governor was made "Commander-in-Chief of the army and navy" (Sec. 6, Art. V); it was made his duty to "take care that the laws be faithfully executed" (Sec. 10, Art. V) and he was authorized (Sec. 4, Art. VI) "to call forth the militia to execute the laws of the State to suppress insurrections and to repel invasions." The substance of those Sections 6 and 10 of Art. V and of that Sec. 4 of Art. VI is to be found in Secs. 7 and 10, Art. IV, of the present constitution; but nothing comparable to that Sec. 1 of Art. V is to be found in the later document.

d.—Legislative and Judicial powers were (by Articles III and IV) vested, respectively, in the Legislature and in Courts substantially as is done in Articles III and V, respectively, of the present constitution.

While that Constitution was in effect cases arose and were decided by the Supreme Court of the State in which principles relevant to the present matter were recognized and/or applied. Some of those cases involved *habeas corpus* in relation to its efficacy in time of actual war *and as only partially secured* by constitutional terms allowing its privileges to be sus-

pended on occasion; others have direct relation to superiority of civil authority in other respects. And all of them demonstrate the maintained independence of that Court. Reference will now be made to those cases.

EX PARTE COUPLAND, 26 TEXAS 387:

That case was decided in 1862 by the Supreme Court composed of Chief Justice Wheeler and Justices Moore and Bell. The question directly involved was validity, or not, of the "Conscript Act" of the Confederate Congress. Coupland had been arrested by order of a provost marshal and had applied for writ of *habeas corpus;* but before the writ was served he had been enrolled as a conscript, and this was made to appear in the military officer's return to the writ. By entertaining the writ and by exercising the right to determine validity of the Conscript Act as applied to Coupland, the Court indicated its power to release the military prisoner if it had concluded his restraint was illegal. And of general matters discussed it is noticeable: (*a*)—It was held that the "State" (as represented by its officers) is not "Sovereign,"—such a State has only the powers 'conferred by the constitution' (which are less than "sovereign power"). It was said (at page 403) of the National and State governments:

> "While both possess some of the powers which are called by law writers, in distinguishing dif-

ferent forms of government, 'sovereign powers,' neither of them are themselves sovereign, but each of them represents the sovereign, and both have within their mutual spheres of action just such powers and functions as have been conferred upon them by the constitution creating them."

(*b*)—Even though it was held that Congress had been lawfully given the "war power"—power "to raise and support armies * * * to the extent that in its judgment it should deem necessary,"—and that, therefore, the "Conscription Act" was constitutional, the court held (pp. 404-405) that exercise of the power was (constitutionally) restricted to "necessity" in fact:

> "It must be borne in mind, however, that the denial of the power to raise such an army as the necessities of the government may require is a denial of the right to raise a single man. While, if the power exist, it does so only to the extent of authorizing the Confederate government to raise and support such armies as are absolutely essential to enable it to carry into effect the powers granted to it. *And though a necessity exists today, and the law is therefore constitutional, if tomorrow that necessity should cease, its continuance would be as clearly unconstitutional.*"

While "Martial Law" was not directly involved (in ExParte Coupland) Justice Bell and Chief Justice Wheeler gave the matter of its legality, etc., consideration:

"Bell, J. I concur in the correctness of the proposition that the right of a party to a writ of habeas corpus does not depend upon the legality or ilegality of his original caption and detention, but upon the legality or illegality of his original restraint at the time the writ is issued and the return made. I do not, therefore, feel at liberty to discuss the legality of the original arrest of the appellant, or the right of military comanders to place the citizens of these Confederate States under martial law. As it appears, however, from the record, that the chief justice, under the original hearing, declared that 'his mind was made up as to the constitutionality of martial law,' from which expression I understand that he meant to express his opinion that martial law, as it existed in the county of Travis at the time of the return of the writ in this case, might be declared and enforced in conformity with the constitution of the Confederate States; that it may not be supposed that I entertain a similar opinion, I take leave to say, that nothing, in my judgment, could be a more palpable violation of the constitution and of the rights of citizens. I believe that 'the constitution,' in the language of Vice President Stephens, 'was made for war as well as for peace;' and that there exists no power, in any department of the government of the Confederate States, to transcend it or to suspend it upon any motion of public necessity. I believe that no power exists anywhere in the Confederate government to subject citizens, not belonging to the army or navy, and not actually serving in the militia, to any military code, or to the will of any military officer, provost marshall or other, or to the jurisdiction of any other tribunal than the ordinary courts of justice established by law. I believe that under the con-

stitution of the Confederate States 'no person can be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger;' and that 'in all criminal prosecutions the accused has the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.' I know that some have supposed that congress has the power to declare martial law as an incident of the power to make war. It is true that congress has the war power; but that power and all its other powers must be exercised in subordination to those provisions of the constitution which I have just quoted. But I said that I do not feel at liberty to discuss this subject. I therefore take leave of it, having said thus much only from a desire that my humble testimony, worthless as it may be, shall ever be in support of the laws and of the rights of the people, rather than in support of arbitrary power, which is destructive alike of public liberty and private right."—Pp. 406-8.

"Wheeler, C. J. I concur in the opinion delivered by Mr. Justice Moore. I express this concurrence in order that there may be no misapprehension as to my opinion as to the real question involved in the case and the grounds of the decision.

"The expression simply of my concurrence might suffice. And it might suffice to dispose of the argument upon martial law to say, there is no question of martial law properly arising for discussion in the case.

"But the observations indulged in the dissent-

ing opinion of Mr. Justice Bell concerning the bill of exceptions and martial law render it proper that I should advert briefly to my action and rulings upon the hearing, in order to prevent misapprehension as to my own opinion and rulings. And to a proper understanding of these rulings it is material to observe that the object of the proceeding upon habeas corpus is to set the complainant free from present illegal restraint. It is immaterial whether the original capition was lawful or unlawful. If at the time of the return of the writ the defendant shows a legal cause for restraint, then imposed, the prisoner will not be discharged, notwithstanding the original taking may have been without any legal authority.

"There was in this case no pretense that at the time of the return or of the service of the writ, the complainant was detained under martial law, or by any other authority than as a soldier, called into the service of the Confederate States under the act of congress known as the conscription law. Whether his original arrest and detention was legal or not was then wholly immaterial, since he had been discharged from that restraint; and the only question was, whether the return showed good cause for his then detention, he having been enrolled as a conscript; whether the law under which he was detained as a soldier was constitutional. It was my opinion that the law was constitutional; and it was upon this ground alone that I remanded him into the custody of the officer."—Pp. 30-1.

"My information from sources deemed reliable was, that congress had authorized the declaration of martial law, and that it had accordingly been declared by authority of an act

of the Confederate congress. If so, the decision of the supreme court of the United States in the case of Luther vs. Borden, 7 Howard U. S. C. 1, then before me, was a direct authority in favor of its constitutionality. In view of that decision, sanctioned by the venerated name of Chief Justice Taney, who delivered the opinion of the court, and who, it will be remembered, on a recent memorable occasion, was the first to raise his voice against the usurpation of the present federal executive in suspending the writ of habeas corpus without authority of law, and without authentic information not accessible, as to the action of congress, sitting, not as a court to pronounce an authoritative decision, but as a single judge in vacation, I did not think proper to pronounce against the authority of congress to declare or authorize the declaration of martial law. Nor do I deem the present an appropriate occasion to express a judicial opinion upon that question. It will become the province of this court to decide upon the constitutional powers of a co-ordinate department of the government when a case is presented calling for a decision. It is proper, however, to say that it now appears that the declaration of martial law in this state was not, as was at the time supposed, by authority of any act of congress; *and it is now conceded on all hands that it was unauthorized.* The only legislation it seems by congress, authorizing its declaration, was the act of the 27th of February, 1862, which provided that 'during the present invasion of the Confederate States, the president shall have power to suspend the writ of habeas corpus in such cities, towns and military districts as shall in his judgment be in such danger of attack by the enemy as to require the declaration of martial law.' As was said by the judiciary committee of the house

on a subsequent occasion, this act either assumed that the president had authority, without the aid of legislation, to declare martial law, or it was designed to confer that authority. The president so understood it, for it is well known that he proceeded to exercise the authority by declaring martial law in several places. Subsequently, in consequence of abuses, the subject elicited investigation. Congress modified its former legislation on the subject, and it is now doubtless better understood than formerly by both the civil and military authorities."—P. 433.

"Note by C. J. Wheeler. In the case of Luther V. Borden, Chief Justice Taney delivering the opinion of the court, and referring to the act of the legislature of Rhode Island declaring martial law throughout the state, holds this language: 'Unquestionably a military government established as the permanent government of the state would not be a republican government, and it would be the duty of congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crises, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably, a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government—essential to the preservation of order and free institutions, and it is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands, and if the government of Rhode Island

deemed the armed opposition so formidable and so ramified throughout the state as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.'

"The court accordingly decided that under the authority of martial law an officer might lawfully arrest any one who he had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. 7 Howard (S.C.), 45, 46.

"Such was the opinion and decision of the supreme court of the United States in a case which excited much attention at the time. That it was deliberately, and not hastily or inconsiderately decided, is manifest from the fact that Mr. Justice Woodbury delivered a most able and elaborate disenting opinion, reviewing the whole subject, and denying the constitutional power of the legislature to declare martial law.

"Judge Woodbury deduces his conclusion thus: 'The necessities of foreign war, it is conceded, sometimes impart great powers both as to things and persons. But they are modified by these necessities, and subjected to numerous regulations of national law, and justice, and humanity. These, when they exist in modern times, while allowing the persons who conduct war some necessary authority of an extraordinary character, must limit, control and make its exercise, under certain circumstances and in a certain manner, justifiable or void, with almost as much certainty and clearness as any provisions concerning municipal authority or duty. So

may it be in some extreme stages of civil war. Among these, my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a comanding officer of troops under the controlling government, to extend certain rights of war, not only over its camp, but its environs and the near field of his military operations (6 American Archieves, 186), but no further or wider. Johnson vs. Davis et al. 3 Martin, 530, 531. On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known at New Orleans. Id. 83.

"I cite these because the principal judicial opinions I have met with on the subject. It is one of great moment, involving the powers of the government and the liberty of the citizen, which has no safeguard but in the supremacy of law. It is a subject, too, which the history of this country, until recently, had given but little occasion to investigate. And hence, when the occasion arose in a time of great public danger, the question was not so well understood, nor the limits of the legitimate exercise of power as well guarded, as since the unwarranted powers assumed in some instances have challenged a more thorough investigation and understanding of the subject by congress and the country. Since congress has been called upon to revise its own legislation on the subject, conceded now to have been at first not well considered, the judiciary committee of the house have made a report in which the subject has been examined and some general views presented, which appear to have been approved by congress. The committee concluded that as laws can be suspended only by the

law-making power, and as all the legislative power of the Confederate States is vested by the constitution in congress, it follows that no law can exist by the authority of the Confederate States unless it be enacted by congress. 'And in whatever sense martial law may be declared (they say), the power to declare or authorize it seems to belong exclusively to the legislature, whether of a state or of the Confederate States.' 'If martial law over the people be necessary in any case, it should be regulated and defined in a sense consistent with the constitution, by distinct enactments.' It is conceded that the necessities of war may sometimes impart extraordinary powers to military commanders. Such instances are referred to in the opinion of Mr. Justice Woodbury. But these seem to be the cases contemplated in the observations above quoted. Whenever, therefore, a case shall arise under the legislation of congress, it will become the province of the judiciary to decide whether such legislation is warranted by the grant of powers in the constitution.

"In any view, the difficulty seems to be to define what is meant by martial law. If by it is meant a power to exalt the military above the civil authority, or to supersede the latter by the former, no one would contend for such a power in any officer or department of the government; for that would be in manifest violation of the constitution, which must ever be held paramount, and in subordination to which all power must be exercised as well in war as in peace. But unless what is meant by martial law be defined in advance, it would seem difficult to pronounce either that it can or cannot constitutionally be declared or enacted. And the only

test to which any legislation which may be had on the subject can be applied is its conformity to the constitution, which of course cannot be done in advance of, or without knowing what that legislation is."—Pp. 434-6.

EX PARTE TURMAN, 26 TEXAS 708:

This case was decided at the Tyler term in 1863 by Chief Justice Wheeler and Justice Bell (Justice Roberts absent),—opinion delivered by Justice Bell. The nature of the case is shown in the following excerpt:

"Applicant petitioned for the writ of habeas corpus on the 13th day of May, 1863, alleging that he was illegally restrained of his liberty by S. M. Warner, in Smith county. Writ issued May 14, 1863. Respondent made his return to the writ on the 15th day of May, 1863, in which return he says that applicant reported to him under orders from General D. B. Martin, general enrolling officer eastern district of Texas, on the 14th day of March, 1963, and that he holds applicant only as a conscript liable to do military duty under the Confederate States conscript laws. On the 23d of January, 1863, applicant was indicted by the grand jury of Smith county, for 'knowingly, maliciously and advisedly discouraging the people from enlisting into the service of the Confederate States of America, and did then and there knowingly, maliciously and advisedly discourage the people from enlisting into the service of this state, the said State of Texas, and then and there willfully and maliciously did dispose the people to favor the enemy.' On the 14th of March, 1863, the applicant gave bond for his appearance be-

fore the district court of Smith county to answer said indictment."—P. 709.

Turman was remanded; but the duty of the military authorities to surrender him to the civil authorities for trial, if, as and when his presence weredemanded (by the District Court in exercise of its jurisdiction) is stated by the Court:

"The conscript laws have been enacted, have been held by this court to be constitutional, and are therefore to be treated as the law of the land, to which the State of Texas has given assent.

"It is held that the right of the Confederate States to compel the citizens of the states to do military service is superior to the right to the state over her militia. It follows, that if the State of Texas can require the applicant in this case to do military service as a militiaman, the Confederate States can also require him to do military service in the army of the Confederacy, in obedience to the conscript law. The state by her militia law has not exempted from service persons who are under bond to answer criminal accusations of any kind; neither does the exemption law of the Confederate States excuse such persons from service. But we are of opinion that, by necessary construction, the militia law of the state and the conscript laws must be held to operate only on persons who are enjoying the rights of citizens, and in the exercise of personal freedom. We cannot suppose that the officers appointed by the state to enroll the militia, nor the enrolling officers of the Confederate States could go into the jails and dis-

charge persons accused of crimes from custody for the purpose of placing them in the military service. And this, because such persons are in the hands of civil officers, in obedience to the mandate of the civil tribunals and of the laws, and it cannot be supposed that the state or the Confederate States intends any interference by the military with the civil authority, much less to make the civil authority which is already in action subordinate to the subsequent demand of the military authority. It may then be said that one who is under bond to appear before the civil tribunals is to a certain extent in the custody of the tribunal or of the law. This is true, and may, perhaps, further the solution of the questions involved in a case like the present. Being in the actual enjoyment of personal freedom for the time being, the party may be required by the state to render any service not inconsistent with the qualification which has been by law imposed upon the right of the party to enjoy his freedom, and not inconsistent with the policy which the state has declared by her general law for the punishment of crimes, and by the action which has been taken in the particular case. We do not doubt that if the district court were now in session in the county of Smith, the judge of the court could issue the proper writ to the military officer having the applicant in a camp of instruction within the jurisdiction of the court for trial, and it would be the duty of the military officer to obey the writ."—Pp. 712-3.

EX PARTE MAYER, 27 TEXAS 716, 719:

It will be remembered that it had been held (in Ex Parte Coupland, 26 Texas 387, discussed hereinabove) that the "war power" — power to raise

armies was vested in the Confederate Congress "to the extent that in its judgment it should deem necessary" but that use of such power is restricted to actual necessity. In Ex Parte Mayer (p. 719) it is recognized that the court may review and correct abuse in exercise of the power:

> "The power to raise armies has been exercised on grounds supposed to be proper by the party who is to judge of its propriety and necessity, and the presumption is not to be indulged that the power has been perverted, or that its exercise will be abused in a way to defeat rights secured by the constitution or reserved to the states; or, in other words, it must be a clear case of violation that will warrant the interference of the courts."—P. 719.

STATE VS. SPARKS AND MAGRUDER, 27 TEXAS 627, 27 TEXAS 705

Peebles and others were in custody of military officers on charge or suspicion of aiding or encouraging the enemy. They sued out writs of *habeas corpus* and, thereupon, were by the Supreme Court put in custody of the Sheriff of Travis county pending decision of the cases. Major Sparks (commandant of the Post at Austin), acting or claiming to act by orders of Major-General Magruder (commander of the military district of Texas, New Mexico and Arizona and who acted or claimed to act under orders of his superiors), took the prisoners from custody of the Sheriff. The opinions cited in the heading above had

to do with contempt proceedings consequent upon that military interference with jurisdiction of the court. And in terms free of equivocation the court declared the superiority of its jurisdiction and the criminal nature of infringement by military officers. Account of patriotic motives the right to punish by imprisonment was waived and nominal fine (costs) was allowed to suffice-but this, considered with the holdings made, cannot be taken as doubt of the right of a citizen (not in military service) to appeal to the courts or of the courts' power to give such relief as may be proper. We deem it appropriate to present generous excerpts from the opinions.

FROM 27 TEXAS 627:

> "The prisoners in the meantime again passed into the hands of the sheriff to abide the further action of the court. On the same day, however, and shortly after the adjournment of the court, the prisoners were forcibly wrested from him by a detachment of armed soldiers, acting under the command and in obedience to the order of the defendant, Major Sparks. Immediately upon the filing of this affidavit, writs were issued by the court to said sheriff, commanding him, without delay, to take said prisoners again into his possession, and also to attach said Sparks, and have him before the court to answer for the contempt committed against it by his wrongful and forcible infringement of its authority, in taking said prisoners out of its custody and from under its control. These writs were both duly executed, and on the next day

the defendant, Sparks, filed an answer to the attachment, in which he states, in substance, that he had received an order from Major-General Magruder, stating that he had been ordered by Lieutenant-General Smith, commanding the trans-Mississippi department, to detain as prisoners the persons referred to as in charge of the sheriff; and having previously received orders from said Major-General Magruder to place the escape of said prisoners beyond a doubt by placing a sufficient guard over them, and having once furnished a guard which was rejected by the sheriff, and being satisfied that the prisoners were not fully guarded by the sheriff, and feeling, under the orders of the officers having the right to order him, that he was held by them responsible for the safety and protection of said prisoners, and being of the opinion that they were then constructively in the possession of the military, and being ordered to disregard the then existing writ of habeas corpus, or any writ which might subsequently be issued, and having, designing and meaning no contempt of the court, but a desire to discharge his duty as an officer in obedience to orders, and having first requested the court to remand the prisoners to the military authorities through him, their then representative, and the court having declined to act on his request, but taking it under advisement until the next day, he felt it his duty to act as he had done in taking the prisoners * * *

"The fact that we have recited show that the prisoners heretofore named were in the custody of the court, acting through its ministerial officer, for their judicial action in a matter with which they are charged by the constitution and laws of the state. It certainly needs neither argument nor authority to show that there is no

officer or tribunal, civil or military, known to the law of the land, that could, without a violation of law and a contempt of this court, forcibly take from under its control, and without its consent, said prisoners, until the final adjudication of the court upon the matter before it. The answer of the defendant, when analyzed, seems to present the following grounds for the justification or extenuation of the act for which he was called upon to answer: 1st, the failure of the sheriff to properly guard the prisoners; 2nd, that the court continued until the next day the motion to redeliver them to the military authorities; 3rd, that he was compelled to act in the manner he did by the orders of his superior officer, Major-General Magruder. As a brief comment upon these assumptions in the defendant's answer, we will say: That he labored under a delusion if he supposed that he could be held officially responsible for any neglect of duty by the sheriff. If, however, the sheriff was derelict in duty, he should have brought the matter to the attention of the court, by whom it could and would have been properly corrected. No such fact, if indeed it were the case, was intimated to the court from any quarter, and the continued presence of the prisoners before the court, from time to time, is at least prima facie proof of the sufficiency of their guard.

"The continuance of a question by a court, that it may be correctly determined by the aid of proper reflection and the examination of precedent and authority, can only be regarded as a justification or extenuation of such an act as was committed by the defendant, when the civil tribunals of the country sit merely for the purpose of registering the edicts of the military

authorities. The presentation of such a matter in an answer is rather an aggravation than an extenuation of the outrage committed upon the authority of the court.

"Nor can an illegal act be justified, no matter how high the source from which it emanates, by an order from superior authority. Military officers are bound to obey all legal orders of those by whom they are commanded. But there is nothing better settled, as well by the military as the civil law, than that neither officers nor soldiers are bound to obey any illegal order of their superior officers; but, on the contrary, it is their bounden duty to disobey them. The soldier is still a citizen, *and as such is always amenable to the civil authority.* We are of opinion, therefore, that the orders of Major-General Magruder can furnish the defendant, Major Sparks, no justification for his forcible interference with the jurisdiction of this court, and setting at naught its lawful orders. If, however, he was in truth acting, as he claims, in obedience to the orders of the major-general commanding this military district, it certainly would go far to excuse him. While an officer must not obey an unlawful order of his superior in command, yet, as in all cases where he declines obedience to it he acts at his peril, much indulgence should be shown in extenuation of his obedience to such orders from those he is ordinarily bound to obey. Especially should this be so, when the orders come to him from such high authority as that from which the one now in question is claimed to emanate.

"But if these considerations extenuate the act of Major Sparks, they do so only by inculpating Major-General Magruder. If the act was done

in obedience to his order, he is the princial offender. Those by whom he has, if this be so, perpetrated so glaring and palpable an outrage upon the law and the authority of this court, are alike subordinates in criminality, as inferiors in rank. But the high position of this officer and the important duties with which he is entrusted by the country, forbid that we should indulge the supposition, in a state of case upon which he has not been heard, that 'he has converted the means of discipline, intended for the defense of order, and thus has turned the instrument against the power that ought to wield it; for it is the civil government alone that stands for the state, and the military is only an instrument that it uses as its judgment requires.' Better far would it have been, for the prisoners who are in custody of the court, though doubly guilty beyond all that has been charged against them, to go unwhipped of justice than for the civil authorities of the state to be subordinated to military control, and made dependent upon the consent of the latter for the exercise of their legitimate functions. The one, though to be deprecated, would be of comparatively little importance, but the other would be a vital blow at the constitution, and the principle upon which our government is organized.

"It is much to be regretted, especially at a time like the present, that the major-general charged with the defense of the state should seemingly be brought in conflict with the judicial authority. But we should be derelict in the discharge of the high trust committed to us by the constitution and the laws if we should permit to pass unquestioned so palpable and glaring an outrage upon the law and the mandates of the court in which we have been called to pre-

side, as that with which, we trust improperly, Major-General Magruder is implicated by the record now before us. We deem it, therefore, our duty as judges, our duty to the country, and also our duty to Major-General Magruder, to afford him an opportunity of relieveing himself from the improper attitude in which, as the record now stands, he is presented before this court. In a judicial tribunal, the rights of the humblest citizen are equal to those of the highest civil or military dignitary. If such an act as that in which Major-General Magruder is here implicated by the answer of Major Sparks were charged upon an unknown and private citizen, there is no question that it would be said at once to be the imperative duty of the court to call him before it by attachment, to answer his apparent contempt of its authority. And if it were not for the situation of the country, and the important duties with which Major-General Magruder is charged for its defense, this would be our plain duty in the present instance. But, under the circumstances which now surround us, we think, while we endeavor to enforce respect for the authority of the court, and to sustain the law, we should not be unmindful in other respects of the public welfare, or forgetful of the important duties with which the distinguished officer, whose acts are now in question, has been entrusted, or the respectful consideration due to his high official position. In view of all these considerations, we are of opinion, and do, therefore, order that a citation be issued to Major-General Magruder, accompanied by a copy of Major Sparks' answer under oath before this court, at Tyler, on or before the fourth Monday in April, 1864, and show cause why he should not be held as having acted in contempt of the authority of this court, in or-

dering said Sparks to take from the custody of the court the prisoners heretofore named, and to disregard the writ of habeas corpus issued by the court by virtue of which said prisoners were brought before it, or any subsequent writ which might be issued."

FROM 27 TEXAS 705:

"Moore, J. This case was transferred to this place from Austin to afford the defendant Magruder an opportunity of filing an answer, in obedience to an order of the court then made upon him. His answer is now before us, and we therefore proceed to make a final disposition of the case. The preliminary facts out of which this proceeding has originated are sufficiently stated for the proper understanding of the action of the court in the opinion which was delivered in it at Austin, and need not be here again repeated. At that time we felt constrained to say from the facts then disclosed, that Major-General Magruder was apparently guilty of a palpable and glaring violation of law and contempt of this court. We trusted, however, that it was only necessary to give Major-General Magruder an opportunity of being heard, to relieve him from so disreputable an imputation, and the court from the painful duty of pronouncing the highest military officer of this department guilty of using the authority with which he has been entrusted for the public welfare and the defense of the state, as a means of violating the law, interfering with and contemning the authority and process of its courts, and thus violating social order, which he should have been the first to have upheld and sustained. We have, however, we regret to say, been wholly disappointed in this just expectation. The an-

swer of Major-General Magruder, instead of exculpating him, places him, if possible, in a still more unenviable light than did the facts previously developed in the record. Before reading his answer, it might have been supposed that his violation of the authority of the court and interference with its functions was not the result of premediation and design, or the assumption of an authority plainly at war with the most obvious and best settled principles of law and judicial procedure.

"The pretext upon which Major-General Magruder undertakes to justify his interference with, and attempting to set as naught the authority of the court, is mainly upon the startling ground that the court does not acquire jurisdiction of the persons of the applicants for a writ of habeas corpus, pending the hearing on its return. That the extent of the power he claims for himself, and the restrictions he assumes to place upon the authority of the court in the discharge of its duties, when its functions are invoked by this great writ for the security of personal liberty, may be more readily perceived, we make the following extracts from his answer:

" 'The major-general commanding was not aware that these persons had passed out of the hands of the military authorities when they were brought before the supreme court upon the writ of habeas corpus; nor did he intend, when they were brought before that tribunal, to yield them to the entire control of the civil powers, until it had been decided that they were illegally arrested, and unlawfully in the possession of the authorities restraining them of their liberty. The mandate of the court required the

prisoners to be brought before it, and the parties detaining them to show by what authority, etc. The prisoners were brought, and the proper returns were made, and the major-general commanding supposed that he had virtually the possession of the prisoners, and the honorable court before whom they were brought should decide whether or not they were properly and legally in possession of the military authorities. The idea that the parties suing out the writ of habeas corpus were to be entirely under the control and direction of the supreme court, and entirely free from the control of the military authorities as soon as they were brought before that tribunal, was one which the major-general commanding could not entertain; nor did he contemplate that the guard which he had ordered to accompany these men from San Antonio to Austin, in obedience to the mandate of the supreme court, had left the prisoners in the hands of the sheriff of Travis county, and returned to San Antonio, until made acquainted with the fact by Major Sparks, commanding post at Austin.'

"In another part of the answer he says: 'This was the view taken by the major general commanding, and he did not suppose that the prisoners had been transferred from his custody to that of the civil authorities, but that he was only liable in case they were not before the court, when required and necessary to be there pending the trial or investigation of the case. The law holds the party restraining another of his liberty responsible for his act, if the restraint be illegal, but it does not take the prisoner out of his custody until the illegality is determined.'

"Again he subsequently says: 'An official copy of the law of congress suspending the writ of habeas corpus having been received at these headquarters, and under it and in accordance with its provisions Lieut. Gen. E. Kirby Smith, commanding department trans-Mississippi, having ordered the major general commanding to detain the prisoners heretofore alluded to, an order was dispatched forthwith to Maj. Sparks (whom the major general commanding believed to be in possession of the prisoners, the guard from San Antonio having returned home, and the commander of the post at Austin having been ordered to guard the said prisoners), directing him to bring Messrs. Peebles, Baldwin, Zinke, Hilderbrand and Seeliger away from Austin under a sufficient guard, and to disregard 'the present writ of Habeas corpus, or any writ which may subsequently be issued.'

"We will not pause to cavil with the seemingly contradictory statements shown in these extracts from Major General Magruder's answer. It is immaterial at present to inquire whether he knew, as he says he was informed by Major Sparks, that the prisoners had been placed in charge of the sheriff, or supposed that they were still under the control of his subordinate officers, as he insists should have been the case. The prisoners, he evidently intends to insist in point of right, if not in fact, were under his control; that they did not, upon the return of the writ of habeas corpus, pass into the custody and jurisdiction of the court; that at least he did not intend to surrender the entire control of them to the civil authority. Upon this hypothesis, and an equally obvious misconception of the facts of the case and the law of congress suspending the privilege of the writ of hebeas cor-

pus, he seeks to excuse, if not to justify, his interference with and violation of the mandate of the court, and his order to his subordinate officer to disregard its process. If it were not for the mischievous character of such an assumption, coming from such source, we would deem it scarcely necessary to say that it is unsustained by judicial authority or plausible argument. It will perhaps be admitted, even by those with whom it has become of late too much the fashion to violate the rights of persons and property upon the plea of a 'military necessity,' as a novelty of which the defendant is entitled to the paternity.

"He admits now, it is true, since, as he says, this seems not to be the view entertained of the law by this court, that he may be mistaken as to its correctness; but if so, he seems to rely upon his ignorance as an ample vindication of his crime. When the criminality of an act depends solely upon the intention with which it is committed, ignorance or inability to obtain proper information may be considered in determining the question of guilt. But the charge upon which these parties are before us is for an act in violation of law, and therefore a crime independent of the intention of the parties who committed it, as much as any other crime for which they could be indicted. It can, however, excite but painful reflection to find an officer in the high position in which Major General Magruder has been placed, and who must so often be called upon to deal with the rights of person and property of many citizens, seeking to defend himself from a criminal imputation upon the ground of ignorance. Such a plea could not be admitted in favor of the humbest citizen, with sufficient capacity to render himself re-

sponsible for the consequence of his acts. Does it come with a better grace from this high officer? At least we think it is not expecting too much of him, if ignorant of the plainest and simplest principles of the administration of the law, that he should inform himself in respect of them before undertaking to interfere with and control the judicial tribunals of the country.

"That hereafter even Major General Magruder may have no ground to doubt the rule by which he should be governed when called upon to answer to a writ of habeas corpus, we quote what is said on this subject by a standard elementary writer: 'Pending the examination or hearing, the prisoner in all cases on the return of the writ is detained, not on the original warrant, but under the authority of habeas corpus. He may be bailed on the return de die in diem, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the court, or officer issuing the writ, and, by its officer, brought up from time to time, till the court or officer determines whether it is proper to discharge or remand him absolutely. The King's Bench may, pending the hearing, remand to the same person or to their own, the Marshalsea. The efficacy of the original commitment is suspended by this writ while the proceedings under it are pending, and the *safe keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made.* (Per Nelson, In re J. Kaine, 14 How., 134; Bac. (710) Abr., title Hab. Corp., B. 13; The King v. Bethel, 5 Mod., 22, 1 Vent., 33-346; Fort, 242; Hurd on Hab. Corp., 324.)

"There is another point, the importance of

which forbids our passing it unnoticed. Major Gen. Magruder bases his right to order his co-defendant Sparks to take the prisoners, who are under the control of the court, from out its custody, and to disobey any future writ from the court, upon the recent act of congress suspending the privilege of the writ of habeas corpus, and that there was an order under it from the commanding general of the Trans-Mississippi department, for the detention of these prisoners. If it were admitted that this law, and the alleged order made under it, are quite sufficient to have stopped the investigation of the case pending before the court on the habeas corpus, and to require the immediate remittal of the prisoners to the military authorities, it is altogether evident that it could only have been its error in so doing, it would not have justified the defendants, or any others, in taking the law into their own hands and disobeying or violating its process. The proposition that the process of a court in a case which, ultimately, it should dismiss, may be treated with disobedience, is one which cannot, for moment, be sustained. In discussing this question in the case of Passmore Williamson, Mr. J. Black remarks: 'We, ourselves, have heard many cases through and through before we became convinced that it was our duty to remit the parties to another tribunal. But we never thought that our process could be defied in such cases more than in others.' And Mr. Justice Lewen, with great force, says: 'It is an essential element of judicial authority that it must be the judge of its own jurisdiction; and I do not know that this rule is peculiarly applicable to the higher courts. The lower must act upon it, subject to the higher social law that is involved in official subordination. Often the question may be erroneously de-

nied. Often such decisions may result in great injury to the citizen, but it is the lot of government to err, because it is human; and a man of well-trained mind will think it no great hardship to submit to authority even in error. In the name of order, the country demands, and has the right to demand it.' Again he says: 'In civil matters there can be no moral principle of higher importance than the one that is most deeply involved in this case. It is a principle of action that is as binding on the conscience as any other. It is the great moral principle of social man. Without it, we endanger and retard our social progress. Without it, we confound all official subordination, and affect with disease the very organs of social life. This principle expresses itself, as best it can, in our civil institutions, and thus originating, they are morally entitled to our respect and obedience, imperfect as we may suppose them to be. He that rejects this principle from his moral code, or gives it a low place there, can hardly be an orderly citizen but must be dangerous to the public peace and progress, in proportion as he is otherwise intelligent, influential and active.' (26 Penn. St., 2 Casey, 9.)

"We may also add, the prisoners before the court, as appears from Major General Magruder's answer to the writ of habeas corpus, were arrested by his order, and not by that of the lieutenant general commanding the Trans-Mississippi department. The law suspending the privilege of the writ of hebeas corpus, therefore, had nothing to do with the case presented by his answer for the investigation of the court. Nor had the alleged subsequent order of General Smith, for the detention of these parties, been presented to the court in a manner to re-

quire it to suspend further action upon it.

"The order of Major General Magruder, directing Major Sparks to disregard 'the present writ of habeas corpus, or any writ which may subsequently be issued,' is also clearly in violation of the act of congress, by which he pretended to have been guided. This act confers no such authority on the high officers authorized by it to suspend the privilege of the writ in the particular cases enumerated in it; much less does it tolerate its assumption by Major General Magruder, or its delegation by him to his subordinate officers. The law does not forbid or suspend the issuing of the writ, and unless it appears from the application that relief could not be granted, it may and should be issued by the court, and it is, *in all cases*, the duty of the party, to whom it is directed, to answer to it. That the privilege of the writ in certain cases, and under particular circumstances, is suspended, which otherwise would have entitled the applicant to the production of his body along with the return to the writ, and an inquiry by the court into the cause of his detention, gives no sanction to this plain misconstruction of the law, and usurpation of power claimed by Major General Magruder, and attempted to be conferred by this order upon his subordinate officer.

"The answer, we believe, presents only the additional fact that the defendant, when he gave the orders to his subordinate officer to wrest from the court the prisoners who were in its custody, to disobey the mandate by which they were held, or any writ it might issue, and to remove them, under military escort, to such place as he might direct, at the same time causing a letter to be addressed to the court, in

which he assured it that he intended no contempt of the court, but entertained for it the most profound respect; that it was his pleasure, at all times, to sustain the civil authorities; and that it was also his studious desire to avoid all conflict between the military authorities and civil tribunals. Similar manifestations of exquisite politeness by criminals, while in the act of violating the law, will, perhaps, readily suggest themselves to the readers of fictitious literature, but we doubt if its parallel can be easily found in the dry details of judicial proceedings.

"We have felt called upon to say so much in this case, because, from the position and official responsibility of the principal offender, and the situation of the country, we cannot resort to the ordinary punishment of imprisonment by which such offenses are usually repressed and corrected. Yet the magnitude of the offense, in its paralyzing influence on the usefulness of the judicial tribunals of the country, if unchecked, and that it is the first instance of the kind in which the court has been called to act since its organization, and especially the vital interest of the citizens in respect to personal liberty and security from military usurption, forcibly admonish us that the acts of the defendants should not be passed by without the brand of our most decided condemnation.

"As we have said in our former opinion, the order of Major General Magruder furnishes no justification for the act of Major Sparks, and (713) the court would be fully justified in punishing him by either fine or imprisonment. But such a fine as the law authorizes us to impose, would, in our opinion, be altogether inadequate to the offense of which Major General Magru-

der is guilty. The situation of the country, as we have said, forbids our attempting to punish him by imprisonment. We feel that it would illy comport with the dignity of the court to visit its penalties upon the subordinate offender while the principal is enabled to go unwhipped of justice. We shall, therefore, discharge the rule in this case, with a judgment against the defendants merely for costs. But as it involves questions of equal, if not greater, political than judicial importance, we will order a copy of the proceedings had in the case to be transmitted to his excellency, the governor, that he may give them such consideration as in his judgment they may deserve, and that he may take such action in the premises as may be compatible with public policy and interest."

Octiber 8, 1866, a new constitution was proclaimed by Governor Throckmorton as having been adopted (5 Gammel's Laws of Texas, pp. 857-886). In respect of the Governor and his powers, *habeas corpus*, suspension of laws and superiority of the civil authority it terms were like those of the previous constitutions.

THE EMANCIPATION CASES, 31 TEXAS 504:

These cases were decided at the Austin term in 1867 by a "Supreme Court" whose members were appointed by Brevet Major-General Griffin under Sec. 2 of the Reconstruction Act. of July 19, 1867.

The cases turned on legality, vel non, of contracts whereunder slaves were hired or sold and that, in

turn, was made to depend upon whether the Emancipation Proclamations of President Lincoln had lawful effect to free slaves in Texas. It was held (by the majority) that the Proclamations were without legal effect on property rights, that slaves became free (only) either by subsequent Act of Congress or by adoption of the XIIIth Amendment. Judge Hamilton (having concurrence of Judge Caldwell) dissented, his argument, however, being bottomed upon fact of *actual war* (by what amounted to a foreign government).

The Proclamations (see p. 548 of 31 Texas) purported issuance by the President in virtue of "the power vested in him as Commander in chief * * * in time of actual armed rebellion * * * as a fit and necessary war measure for suppressing said rebellion."

EXCERPTS FROM MAJORITY OPINION:

"Morrill, C. J. In a country, nation, or state, where 'what pleases the prince is law', it is only necessary to know the actions or even the wishes or whims of the prince to adjudicate upon the rights of person and property. In a state or nation where, in times of war, what pleases the commander-in-chief of the victorious party is law to the conquered, a proclamation of the commander, setting forth his will, would be decisive of the status of the conquered. There are but few nations, even among the civilized of modern times, who in times of peace are gov-

erned by a 'rule of action prescribed by the supreme power in a state!' and still less is this number in times of war. Even in that nation which we denominate our parent country, and which is, par excellence, a country of laws in peace, the happiness or misery of the conquered in times of war depends in a great degree upon the wishes, will, whim, or caprice of the victorious commander. Whether the conquered shall retain their lives, liberty, or property, or whether their property shall be confiscated and they themselves blown from the cannon's mouth, depends in a great measure upon the humanity, avarice, or bloodthirstiness of the general in command. The history of the world is a detail of wars, 'and woe to the conquered' blackens every page. But there is a nation whose theory of government is based upon law, both in peace and war; where the organic law provides that no person shall be deprived of property without due course of law;' and where in times of war not the commander-in-chief of the army and navy, but the 'congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water,' 'to raise and support armies,' 'to make rules for the government and regulation of the land and naval forces.' "

"It is evident that if, during the rebellion, the citizens of Texas were citizens of and subject to the constitution of the United States, then they could not 'be deprived of property,' in salves, money, stocks or agricultural products, without due course of law. If they were a part of another state or de facto government, and they and their property were captured by the forces of the United States, in that case not the commander-in-chief of the army and navy of

the United States, but congress, and congress alone, had and has 'power to make rules concerning those captures.' In either case the proclamations, military orders, or whatever else they may be called, can have no effect or force upon any other than the men subject to the commander, unless they may be based upon an act of congress. The powers of the government of the United States are separate and distinct. The powers which belong to one department are exercised by the officers belonging to that department, and exercised independently of any of the others. Each department is separate, co-ordinate and equal. No majesty is recognized but the majesty of the law; and no man can exercise any power but such as has been delegated to him merely as the servant of the people."

"If, as contended, the proclamation of the president, ipso facto, made all slaves free, it would be in utter disregard of the acts of congress, thus pointing out the manner and conditions of their freedom, and virtually nullify them. And if the judiciary prove subservient to the executive, our boasted republican government is really, quoad hoc, an absolute monarchy in times of war."

"When the war occurred it was the business of the United States to take such measures as would most certainly, in its judgment, overcome the rebellion.

"The war had progressed with varied success for nearly eighteen months, and had assumed vast proportions on either side, before it was determined upon, as a measure of war, by the United States, to declare the emancipation of the slaves of the south. It was of course, so

far as the power was concerned, predicated solely upon the rights of the government under the laws of war. That it was felt to be an act of justice to the slaves, when made necessary by the exigencies of the war, by the president of the United States, may be inferred from the last paragraph in his memorable and final proclamation of emancipation of the 1st January, 1863, and that as a measure of war it was resorted to."

"I am asked to point to the provisions in the constitution of the United States which authorized the proclamation. If I have made myself understood, this has been answered. But, in further answer, I reply, The same provisions which conferred authority upon the president to send hostile armies into the midst of the southern states to make war, to seize and destroy property, and, if need be, to desolate the land to maintain the national authority.

"These things could not have been done in time of peace, any more than the emancipation of slavery, without a violation of the constitution, but in time of war they were properly done."

As indicated by the words used by them and by sentiments expressed by the Supreme Court of the State (in the cases cited), the People of Texas thought they had adequately secured their liberties against tyrranic encroachments by those of military bent. But events occurred to demonstrate their mistake and to take them, in rapid movement, to corrective action.

E. J. Davis was (in 1870) Governor of Texas by

selection under the Reconstruction Acts of Congress. He manifested appetite for power, and he much desired use of soldiery to achieve and enforce it. Yet he paid some respect to law (at least, its forms) and, thereby, set example that might well be commended to remote subsequent Governors. The Constitution in force at that time allowed *habeas corpus* to be suspended on occasion and allowed laws to be suspended by "the Legislature *or its authority*," i. e., (apparently at least) the Legislature *might delegate* (to the Governor, e. g.) authority to suspend the laws. In supposed authority of those terms of the Constitution the Legislature, at Governor Davis' insistence, enacted a "Militia Act," effective June 24, 1870, (6 Gammel's Laws of Texas, pp. 185-190) of terms of which Sections 25, 26 and 27 are relevantly illustrative:

> "Sec. 25. In time of war, rebellion, insurrection, invasion, resistance of civil process, breach of the peace or imminent danger thereof, the Governor shall have full power to order into active service the military force of this State.
>
> Sec. 26. It shall be the duty of the Governor, and he is hereby authorized, whenever in his opinion the enforcement of the law of this State is obstructed, within any county or counties, by combinations of lawless men too strong for the control of the civil authorities, to declare such county or counties under martial law, and to suspend the laws therein until the Legislature shall convene and take such action as it may deem necessary. In this event the Governor, by

his proclamation, shall designate the county or counties wherein the laws are to be so suspended; and the Governor shall call out such part of the State Guard or Reserve Militia or State Police as may in his opinion be necessary to the suppression of disorder. The expense of maintaining the State Guard or Reserve Militia, called into active service under this section may, in whole or in part, in the discretion of the Governor, be assessed upon the people of the county or counties where the laws are suspended. For the assessment and collection of such part of this expense as may be required to be paid by the county or counties where the laws are suspended, the Governor may provide, and he may also prescribe, the necessary regulations therefor, and may designate the officer or officers who shall make such assessment and collection thereof.

Sec. 27. Whenever the law may be suspended, as provided for in last preceding section, it shall be the duty of the Governor to provide for the trial and punishment of offenders; and the Governor shall make all details of officers for this purpose, and prescribe all necessary regulations for the formation and government of courts martial and military commissions for this purpose."

Of the "Militia Act" and "executive action" under it it was said (in Brown's History of Texas, Vol. II, p. 454):

"The Governor was also authorized to declare martial law, at his discretion, to appoint military commissions to try accused persons, and to enforce this power through the military subject

to his command. He exercised this power in a number of counties in the State—Marion, Hill, Limestone, Walker and others, ordering to Groesbeck, in Limestone County, a body of negro troops from Marion county, to enforce his mandates, and white troops to the other counties. He ordered men to be tried by military commission, several of whom were sent to the penitentiary. In Hill a tribute of $3,000.00 was levied on a farmer by the adjutant-general Davidson, who afterwards fled the State with $40,000 of State funds."

Governor Davis' acts were so rapidly done and the resentment of the people was so instantly spontaneous as to produce a convention at Austin as early as August____, 1870, called by prominent citizens of various political faiths and held in remonstrance. A result was a petition to the United States Congress for relief. Amongst the Petition's recital (see "Weekly Austin Republican," August 3, 1870) are these:

"PETITION of the People of Texas to Congress to Guarantee to this State a Republican Form of Government. We, the undersigned citizens of the State of Texas, without regard to party or race, being thoroughly convinced that our civil liberties are in great danger, if they have not been actually overthrown, by certain laws recently enacted by the Legislature of our State, now in session, which laws were prepared and approved by our present Executive, do hereby humbly petition the Congress of the United States to take such action as will save the good people of this state from the grievous

oppressions of said laws, and we also appeal to our fellow citizens of the United States, without regard to party, to aid us in our petition against the overthrow of our liberties, which cannot be effected in one State without endangering the liberties of the people of every other State of the Union. To prove the necessity of this petition and appeal, we have only to cite the provisions of these laws, which constitute a series of enactments, known as 'administration measures,' from the fact that they were prepared by our State Executive, and passed by the Legislature in conformity with his recommendations. The primary and most important of these enactments are: An act to provide for the organization of the Militia; * * * Much of the other legislation, thus far enacted, is but an adjunct to these primary 'administration measures, as will be proved by reference to their provisions. We respectfully submit these enactments to the candid impartial judgment of Congress, and of our fellow citizens in other States more happily situated than our own. * * * It will be seen that the Governor is the commander of the military forces of the State; * * * he can declare martial law and suspend the laws upon a breach of the peace *or immient danger thereof;* * * * he can try and execute the free citizens of this State by courts martial and military commissions composed of his own creatures; he can depose our judges; he can suspend the writ of habeas corpus, and make our civil officers subservient to the military, and this military not drawn from the body of the people but selected, officers and privates, by himself. If this act leaves anything wanting to create him a despot with unlimited powers, we have failed to discover it. We appeal to Congress and to our fellow-citizens in other States to save us from the evils

which must necessarily flow from any attempt to execute this law in its letter and spirit, for it is a flagrant violation of every article and principal of the constitution of the United States and of this State. * * * Whilst the standing army act gives the Executive regal power over the civil liberties of the people, this act destroys the sacredness of the household by permitting him to send broadcast through the land a band of spies and detectives to worm themselves into the confidence of men for the purpose of betraying them. Whilst the standing army overawes open discontent, the spies and detectives are intended to crush thought and private opinion. This force is the very essence of *Gensdarmerie* of the most absolute monarchies. It is abhorrnt to every idea of republican institutions and American liberty, and we feel assured that such will be the deliberate judgment of every enlightened citizen of our country, ot whom we again appeal to save us from the operations of this law, which cannot be enforced without destroying the bonds of society and all confidence among men. * * * "

Military encroachments (particularly under the "Militia Act") was the principal theme of the Democratic Platform adopted in January, 1871 (see "Galveston Daily Civilian," Jan. 27, 1871). It contained these declarations:

" * * * the Radical State Government has forfeited all claims to the respect of mankind, by its unconstituitonal and oppressive enactments, * * * First—in violation of the Federal and State constitutions, the Legislature of this State has conferred on the Governor, in obedi-

ence to his own dictation, the power to suspend the writ of habeas corpus, to declare the civil laws suspended, close the courts, refuse to our citizens the right of trial by jury, and subject them to trial by a court martial, composed of men who know nothing of the rules of law and evidence, and this in times of profound peace. * * * "

ExGovernors Pease and Hamilton and United States Senator Hamilton ("all well-known Union men" and others of like political faith) joined ex-Governor Throckmorton and John Ireland and other well-known Democrats in calling the "Tax-Payers' Convention" which met in Austin September 22 to 25, 1871. By resolutions unanimously adopted the Convention made appeal to the Legislature for relief against Governor Davis' regime. (Brown's History of Texas. Vol. II, pp. 456-465.)

Excerpts from Resolutions Adopted

"The violations of constitutions and disregard of law have been very frequent and are very numerous; but, frequent as they have been and numerous as they are, we have been unable to find a single one, of either class, based on an honest desire to accomplish good to the people of the State, or to secure prosperity to the country. On the contrary, their apparent cause seems uniformly to spring from one grand purpose, viz.: to concentrate power in the hands of one man, and to emasculate the strength of the citizens of Texas as a free people.

"However hopeless such a design might have

appeared, and however little feared by the reasoning and intelligent might 18 months ago, yet as this day, we must confess, the scheme has far progressed toward consummation, and the people stand stripped of many of the inalienable rights of freemen, while he who is now clothed with these lost rights of the people, gloats on their humiliation and congratulates himself on the possession of kingly power.

"We may safely state that the principal effect of each of the acts we shall name has been, and is now, to abridge the rights of the citizen, and to enlarge, soldify and confirm the power of the Executive.

"2. At a time when measures of grave importance of themselves, and of vital interest to all the people were under discussion in the Senate and not matured, the majority in the State Senate, arbitrarily and without authority of law, placed nearly all the minority under arrest and deprived them of a voice in behalf of the people, and so held them in arrest and silent until the militia law, the police bill, the enabling act, the registration act, and the election law were passed, and until nominations for judicial and other important officers were approved of; all of which measures go to the oppression of the people; and many of the officers confirmed were unqualified as to capacity, corrupt as to morals, and entirely unfiit for high position in any State.

Under the Authority of Martial Law now in force, and being daily executed, the Executive is vested with unlimited power. He is clothed with the power to declare martial law on the most paltry pretexts. He may, to all intents and purposes, suspended the writ of *habeas*

corpus when there is no rebillion, no invasion, and when the public safety does not require it. With martial law declared, and the writ of *habeas corpus* practically suspended, the Executive becomes Dictator in Texas, and his will the sole guide to his action, he may take property or life, and be responsible to no tribunal of justice in the State, so long as he remains Governor and under existing laws.

"It might possibly be said, that though such unlimited power is with the Executive, yet that all the probabilities are that he will not call it into exercise; but already, under the arbitrary power conferred, he declared martial law in the county of Hill, and through machinery rapidly extemporized, gathered by the hands of his adjutant-general, large sums of money from citizens, while under duress, and without a judgment of any court of competent jurisdiction; and under the same arbitrary power, martial law was declared in Walker County, and then, under like machinery, gathered large sums of money from the people, and, in addition thereto, incarcerated a freeman of the State of Texas in the penitentiary; and all this in a time of profound peace, when there was no rebellion, no invasion, when the public safety was not threatened, and when the civil officers in the respective counties were fully able to execute all process, and to arrest all violators of the law. And again in the county of Bastrop martial law was time and again threatened, and held in terrorum over the people thereof, with intent to force the grand jury of said county to indict, by false indictments, the good people thereof, and thus forge a reputation for that people, of being a lawless and criminal people.

"These things have grown into history, and are now recognized as authentic occurrences of the times."

* * *

"19. By orders executed through his armed bodies of police, the Executive has taken control of peaceable assemblies of the people, called together for peaceful and lawful purposes, and there suppressed free speech, under threats of arrest, and subjection to punishment as criminals. (Galveston case.)

"20. The Executive has deliberately disregarded the solemn judgment of the District Court, and ordered his policemen to contemn the court, and by force, with arms in their hands, to defy the court, and to execute his will in a question of law where the court had decided the case and entered its judgment of record. (Brownsville case).

A result of those occurrences was the election of a Legislature of such views as that repeal of the "Militia Act" immediately followed its convention. See 7 Gammel's Laws, pp. 468-9.

The Democratic Platform of 1873 was written by a committee of which John H. Regan was Chairman and whose membership included R. R. Gaines, T. J. Brown, Seth Sheppard, J. W. Throckmorton, and Joseph D. Sayers. It recited:

"* * * We congratulate the people of Texas on the repeal by the Thirteenth Legislature of

> a number of oppressive, odious and unconstitutional acts, passed by the Twelfth Legislature, in pursuance of the Radical policy to overthrow the government of the people, and among which acts were: 1. The Military Law, whereby the Governor was authorized to suspend the writ of *habeas corpus* and establish martial law, thereby depriving the citizens of all legal and constitutional protection, and subjecting their lives, liberty and property to the unrestrained caprice and malignity of a partisan Executive. * * * "

With the military or "supreme executive" activities of Governor Davis' administration yet recent history, a constitutional convention met in Austin (September 6, 1875) and prepared the instant constitution and it was adopted by overwhelming vote of the people February 15, 1876. That instrument (in respects important here) differs widely from all previous Texas constitutions and, in fact, from any and all American constitutions. For whereas anciently in Texas (and presently in Colorado, Idaho, Kentucky, Montana, Nebraska, Pennsylvania, and some twenty other States) "the supreme executive power" was vested in the Governor, no such or comparable term is to be found in the Texas constitution of 1876. For whereas theretofore it was provided only that the "privileges of the writ of *habeas corpus* shall not be suspended, *except* when in case of rebellion or invasion the public safety may require it" (like as in the constitutions of the United States and of more than thirty States), the Texas constitution

of 1876 (in Sec. 12, Art. I) declares that "the writ of *habeas corpus* is a writ of right, and shall never be suspended." And whereas under former constitutions of Texas (and instant ones of many other States) laws might be suspended by "the Legislature *or its authority*," Sec. 28 of Art. I of the constitution of 1876 provides that "no power of suspending laws in this State be exercised, except by the Legislature."

Since, as must be admitted on all hands, "Martial Rule" cannot lawfully co-exist with unsuspended *habeas corpus* and municipal law, it cannot be doubted that our people consciously sought to make lawful "Martial Rule" impossible by the substantial changes deliberately made in their constitution in 1876. That they did so is, in effect, recognized and declared by the Court of Criminal Appeals in Arroyo vs. State, 69 S. W. 504, wherein it is said:

> "Thus we are confronted with the proposition, which Appellant assumes to be correct, that the legislature has authority to delegate power to the city council of the city of Dallas, under its special charter, to supersede and set aside any state law which may come within the terms of the delegated authority. Article 1, Sec. 28, of the state constitution provides: 'No power of suspending laws in this state shall be exercised, except by the legislature.' Prior to 1874 this section was as follows: 'No power of suspending laws in this state shall be exercised, except by the legislature, or its authority.' It may have been the law or a correct contention, under prior constitutions in this state, to assume and assert

the proposition here contended for by appellant; but with the change of the constitution the right of the legislature to delegate its authority ceased to exist. It is not necessary to go into the history of the reasons for this change in the constitution, for it is too well known and too fresh to be easily forgotten. Without reviewing the history of the oppressions which grew out of the suspension of laws by reason of such delegation of legislative authority and the declaration of martial law scarcely more than a quarter of a century in the past, it is sufficient to state the fact of such occurrences, and that this change in the organic law swiftly followed, prohibiting such action by the legislature. The legislature is but one of the three co-ordinate branches of this government, and has no authority to set aside and override the express limitations upon its power. This matter has been reviewed in our state by our courts of last resort, and the matters fully and freely discussed, the result of those decisions being adverse to appellant's contention. Therefore we deem it unnecessary to enter into a further discussion of the matter. In support of our conclusion, holding that the position assumed by appellant is not the law, we cite the following authorities: Ex Parte Ogden (Tex. Cr. App.) 66 S. W. 100; Burton vs. Dupree (Tex. Civ. App.) 46 S. W. 272; Ex Parte Coombs, 38 Tex. Cr. R. 648, 44 S. W. 854; Ex Parte Ginnochio, 30 Tex. App. 548, 18 S. W. 82; Ex Parte Sandstrom, 25 Tex. App. 133, 8 S. W. 207; Bohmy vs. State, 21 Tex. App. 597; 2 S. W. 886; Flood vs. State, 19 Tex. App. 584; Angerhoffer vs. State, 15 Tex. App. 613; 3 Am. & Eng. Eng. Law, p. 698 et seq. and notes for collated authorities. Under these authorities, and under the constitution,

the legislature had no right to delegate its authority in a municipal charter to set aside, vacate, suspend, or repeal the general laws of this state. Any act of the legislature which seeks to confer such jurisdiction upon a municipal corporation is violative of the constitution, and therefore void. The city ordinance, as well as the provisions in the charter granted the city of Dallas, relied upon by appellant, being in conflict with section 28 of the bill of rights, in so far as they undertake to grant authority to supersede the state law, are null and void."

We repeat: The terms of the Texas constitution plainly negative lawful existence of "Martial Rule" at any time, under any circumstances. Alternatively we say: Since no officer or body, save the Legislature itself, may lawfully work suspension of laws, legal "Martial Rule" cannot possibly exist so long as the Legislature has not suspended those laws whose suspension is indispensible to that "Rule." Such, we repeat, is the literal meaning of the constitution's terms, and there is, in consequence no ground for contrary implications. But if there were reason for doubt in the premises, the history of Texas (popular and judicial) in its every relevant incident, denounces all pretexts of military rule.

Nor may counsel for the Governor and his military men produce authority for a contrary view. This they have attempted, but in the attempt they have failed for reasons already given and for rea-

sons now to be suggested.

Their first reference, of course, is to United States ex. rel. McMasters vs. Wolters, 268 Fed. 69. In that case, it ought be remembered, authority of the Governor to institute "martial law" was not in issue. McMasters *conceded* the Governor's alleged authority and it so stated by Judge Foster. Its immediate context shows that Judge Foster's statement that the "Governor had complete authority to institute martial law" was meant to refer to his authority to use the militia to enforce the law, and not to any authority to set the law to one side. Again: the provost court was undertaking to enforce the "civil law" in trying and convicting McMasters; he was sitting in the place of the municipal judge who had been suspended (for alleged delinquencies), and Judge Foster merely held that suspension of the municipal judge was not suspension of the law.

In-so-far-as Martin vs. Mott, 12 Wheat, 29-31, and Luther vs. Borden, 7 How. 1, relied upon by Appellants, it ought to be remembered that those cases cannot be called to their aid except upon pure *assumption* that the "discretion" claimed for the Governor has, in truth, been vested in him by Texas law, and that would amount to assuming as settled one of the very points which are now at issue. In neither of those cases was there possible ground upon

which a doubt of the lawful vesting of the power there involved could be founded. In Martin vs. Mott the power referred to is the unquestioned power of the President to call out troops. And in Luther vs. Borden the power referred to was the authority of the Legislature of Rhode Island (not the Governor) to declare "Martial Law," and that power was given in so many words by the "charter" (which was the constitution) of the State. (See Story on the Constitution, 4th Ed., Vol. I, p. 62). Besides, Luther vs. Borden involved a situation of rebellion in fact.

Each of the other cases cited by Appellants likewise involved conditions of actual violence, to such extents, in some instances, as to lead the Courts to predicate the decisions made on findings of such war conditions as had effectually closed the Courts and had, of themselves, suspended all civil law (this being notably true in respect of the West Virginia cases).

Of some of the other cases cited by the Appellants some particular, but brief, notice will be taken.

State Ex. Rel. Mays vs. Brown (*W. Va.*) 77 *S. E.* 243, 45 *L. R. A.* (*N. S.*) 996:

The decision in this case (rendered despite a vigorous dissent) is based primarily upon a holding that such actual state of war existed as to effectually close the courts and of itself to suspend civil rights

and remedies, and under State law which was held to give in express terms the authority exercised by the Governor. The Majority Opinion, it will be noticed, denounces the reasoning and the results in Ex Parte Milligan. And the West Virginia constitution did not include (as the Texas constitution does include) a provision against suspension of the laws by officers other than the Legislature.

In Re Moyer, 35 *Col.* 159, 85 *Pac.* 190; 12 *L. R. A.* (*N. S.*) 979; *Moyer vs. Peabody*, 148 *Fed.* 870; *Moyer vs. Peabody*, 212 *U. S.* 78:

These cases involved occurences during period of actual violence. The constitution of Colorado (unlike that of Texas) conferred on the Governor 'the supreme executive power of the State' (Sec. 1, Art. IV); the constitution of Colorado (unlike that of Texas) also allowed suspension of the writ of *habeas corpus* and its privileges when public safety required it in case of insurrection, etc. (Sec. 21, Art. I), and that constitution (unlike that of Texas) did not contain a provision against suspension of the laws. Statutes of the State as construed by the Supreme Court of the State and by implication, at least, vested in the Governor the power claimed by him. The Colorado Court, in its opinion, recognized the fact that the power claimed by implication could not be upheld if the implication should run counter to any expressed provision of the law; hence, it is

reasonable to believe, the Colorado Court would have made decision the exact reverse of that which it did make if the Colorado constitution had been like that of Texas. The decision of the Federal Courts rest, at last, upon the construction of the State law given by the State Court. And in respect of the decision by the Supreme Court of the United States, it is noted that Moyer did not make or present allegations or proof of bad faith in the Governor or of arbitrary and capricious action by him; it is noted, also, that Justice Holmes plainly indicated that the acts of "discretion" of the Governor might, in a proper case, be reviewed and relieved against.

In Re Boyle (*Idaho*) 45 *L. R. A.* 832:

The constitution of Idaho is unlike that of Texas in the following respects First: The supreme executive power of the State" is there vested in the Governor (Sec. 5, Art. IV); second, there is no constitutional provision expressly forbidding suspension of the laws; third, there *habeas corpus* may be suspended for the public safety in case of insurrection, etc. (Sec. 5, Art. I).

UNITED STATES VS. FISCHER, 280 Fed. 208:

The Nebraska constitution, under which this case was decided, is unlike that of Texas in the following respects: First, "The supreme executive authority of the state is vested in the Governor" (Sec. 6, Art.

V); second, there is in it no expressed prohibition of suspension of the laws; third, habeas corpus may be suspended on occasion of public danger account of insurrection, etc. (Sec. 8, Art. I). The actual situation as to violence, etc., there involved was entorely different from that shown in the present case.

COMMONWEALTH Ex. Rel. WORDSWORTH vs. SHORTALL, 206 Pa. 165, 65 L. R. A. 193; By the constitution of Pennsylvania the "supreme executive authority of the state" is given to the Governor (Sec. 2, Art. IV); under its terms the writ of habeas corpus may be suspended, at least by legislative authority, and the laws may be suspended by authority of the Legislature; in all these respects the constitution of that State is unlike that of Texas. Violence in fact, so much so as, in the judgement of the court, to work suspension of law and thwarting of civil precess existed, as compared with a purely imagined possibility of violence in the present instance.

EX PARTE McDONALD, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915-B, 988: By the constitution of Montana the "supreme executive authority of the state" is vested in the Governor (Sec. 5, Art. VII), suspension of habeas corpus is allowed (Sec. 21, Art. 3) and suspension of laws is not expressly forbidden; in each respect the constitution of Texas is

different. Actual violence existed there; none here. And, in truth the opinion (in Ex Parte McDonald) denounces much of the argument made here in behalf of the Defendants. Generally, these observations may justly be taken of the Kentucky case cited by Defendants and of the respects in which the Kentucky constitution differs from that of Texas.

We have stated that the Texas Constitution (of 1876 is distinctive. We again call attention to that fact by way of anticipative answer to a case from any State that may yet be cited by the Appellants. Arkansas and Ohio, of all the states, have constitutional provisions like our Sec. 28 of Art. I (expressly forbidding suspension of laws except by the Legislature itself); but the constitutions of Arkansas differs from ours in that (in Sec. 11, Art. I) suspension of *habeas corpus* is allowed and in that (by Sec. 2, Art. I.) "the supreme executive authority of the state" is vested in the Governor and exactly the same differences (from the Texas document) appear in Sec. 8, Art. I and Sec. 5, Art. III, of the constitution of Ohio. Expressed provision against suspension of laws is lacking in the constitution of thirty-four states; in the constitutions of twelve other states there are expressed prohibitions of suspension of laws "except by the Legislature or its authority." By the constitutions of thirty-one (or more) States *habeas corpus* is allowed to be sus-

pended in event of public danger account of insurrection, etc. By the constitutions of twenty-eight states "the supreme executive power of the state" is vested in the Governors, in those of nine other states "the executive power" of the state is given to the governors, and in the constitutions of each of six other states "the chief executive power" is put in the governor. And "Law Martial" has expressed recognition in the constitutions of Massachusetts (Par. 28 of Part 1st), New Hampshire (Art. 34, Part. 1st), Vermont (Art. 17, Ch. I) and Rhode Island (Sec. 18, Art. I). And in the terms or intendments of our constitution, we say, there is not to be found warrant for "Martial Rule" (or such a "Rule" as the Appellants have inaugurated) at all, at least not by executive authority.

It results, we say that there is in the Governor of Texas no "discretion" such as is claimed for him and, hence, that his attempts to exercise it may lawfully be challenged—at any time or place on ground of bold unsurpation.

But if in our view of State law we be mistaken, and if it be true that Texas has undertaken to confer such power upon the Governor, yet vesting of the power and/or its use (in the manner and to the extent it has been and is being used against Appellees and their properties) was and is void for each and

all of the reasons assigned in the opening pages of this Argument. In any event the facts do not justify what has been done and what is being proposed by Defendants. Ex. Parte Milligan, 4 Wall 2, 18 L. Ed. 281; Mitchell vs. Harmony, 13 How.___.

And if (contrary to the precedent of Davis, Governor of Texas vs. Gray, 16 Wall, and contrary to what is generally stated in United States vs. Lee, 106 U. S.) it be true that preventive process may not operate directly upon the Governor, still there is lacking all warrant for attributing sacrosancy to General Wolters or other subordinates (United States vs. Lee, 106 U. S.; Mitchell vs. Harmony, 13 How.)

Appellants admit that the acts complained of may be judicially reviewed in the future and civil or criminal libility adjudged. They suggest a damage suit as the available remedy. Yet in the case there is admission of insolvency; basic equity, therefore, exists and Appellees ought not be remitted to a futile proceedure.

Respectfully submitted,

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